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Supreme Court of the United States.

OCTOBER TERM, 1887.

No. 305.

THE GERMAN SAVINGS BANK, OF DAVENPORT, IOWA,
Appellant.

vs.

THE COUNTY OF FRANKLIN, IN THE STATE OF ILLINOIS,
Appellee.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

STATEMENT, BRIEF, AND ARGUMENT FOR APPELLANT.

E. E. COOK,
For Appellant.

EGBERT, FIDLAR, & CHAMBERS, DAVENPORT, IOWA.

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STATEMENT OF THE CASE.

The bill in this case was originally filed by the County of Franklin, in the Circuit Court of Franklin county, Illinois, on the 4th day of August, 1880.

It is shown at pages 1–21 of record.

It made defendants the Belleville & Eldorado Railroad Company, the clerk, sheriff, and collector of Franklin county, the auditor of public accounts of the state of Illinois, the state treasurer of Illinois, several private individuals, and the unknown holders of the bonds of Franklin county.

The bill shows that the county had issued $150,000.00 of its bonds, dated the 13th day of November, 1877, to the Belleville & Eldorado Railroad Company. Fifty thousand dollars were subscribed and issued under an act of the general assembly of Illinois, entitled, An act to incorporate the Belleville & Eldorado Railroad Company, approved February 22d, 1861, authorizing subscription to the capital stock of said railroad; and $100,000.00 dollars were subscribed and issued under an act of the general assembly, entitled, An act to authorize cities and counties to subscribe stock to railroads, approved November 6th, 1849. Both classes of bonds were subscribed and issued in pursuance of a vote of the people of the county at an election held on the 11th day of September, 1869.

The bill alleges that the order of the county court (entered July 24th, 1869), submitting the proposition to the voters to be voted on, named certain conditions to be complied with before the bonds should be issued. One of the conditions was that the railroad should be commenced in the county of Franklin within nine months from the date of the election, and completed through the county by the 1st day of June, 1872.

On the 6th of November, 1869, the county court made an order declaring that a majority of the voters

at the election held September 11th, 1869, voted in favor of the proposition to subscribe $200,000.00 to the capital stock of said railroad company. And that court, by the same order, ordered a subscription of $200,000.00 to the stock, viz.: $100,000.00 under each one of the acts of the legislature already referred to, and incorporated in such order for subscription all the conditions contained in the order for the election.

Several orders were made by the county court, and subsequently, by the board of supervisors, extending the time of commencing and completing the railroad, and reducing the amount of subscription, all purporting to be done in pursuance of the election of September 11th, 1869.

On the 12th of November, 1877, the board of supervisors made an amended order (printed record, 28–30) whereby Franklin county subscribed $100,000.00 to the capital stock of the railroad company under the act of February 22d, 1861, and $50,000.00 under the act of November 6th, 1849.

In accordance therewith, the bonds in controversy were issued. The bill alleges that the conditions of the order submitting the question to the voters were never complied with, and particularly that the railroad was not built within the time provided.

That all orders and resolutions of said county court and the board of supervisors subscribing, or attempting to subscribe, stock to the said railroad company are in conflict with the constitution of the state of Illinois, and are void.

That the subscription made on the 6th day of November, 1869, if lawfully made at all, exhausted all the powers of the county under the vote at said election, and that all subsequent attempts to make other subscriptions are utterly null and void.

That the state auditor has no right to levy taxes for the purpose of paying interest or principal of said bonds, and that the state treasurer has no right to receive or pay out the said taxes, but that both will do so unless restrained.

That Sections 13, 14, 15, and 16 of the act to fund and provide for paying railroad debts of counties, approved April 16th, 1869, is unconstitutional and contrary to public policy, and void.

The bill prays that a writ of injunction may issue, restraining and enjoining the state auditor and his successors in office from estimating or determining the rate, per cent, or valuation of property within the said Franklin county requisite to meet and satisfy the amount of interest due or to become due on said bonds, and prays that the various officers be restrained from doing what would be necessary to collect said taxes.

That the individual defendants, unknown holders of bonds, be enjoined from suing the county on any coupons of said bonds, and that the payment of said coupons be enjoined, and that, upon a final hearing of this cause, a decree be entered that said election held on the 11th day of September, 1869, was illegal and void; that the subscription made by the county court on the 6th day of November, 1869, to the capital stock of the

said railroad company, and all subscriptions, or amendments, modifications, or alterations, are void, and not binding on the said county.

That the so-called subscription of $150,000.00 to said capital stock, made on the 13th day of December, 1876, and the attempt made by said county board, on the 12th day of November, 1877, to amend said subscription and to contract for the building of said railroad, is unlawful and void.

That said bonds, and each of them, be declared void; that all the coupons attached to said bonds be declared void, and the holders thereof required to surrender the same for destruction, and that the injunction above prayed for be made perpetual, and for general relief.

A temporary writ of injunction was issued as prayed. Service by publication was made on the unknown holders of bonds.

On the 27th day of October, 1880, decree was taken by default.

At the October term, 1881, the German Savings Bank, of Davenport, Iowa, and others, appeared in the circuit court of Franklin county, Illinois, had the decree opened, and removed the cause to the circuit court of the United States for the southern district of Illinois (record, pp. 75–79).

Before the German Savings Bank filed its petition and bond for removal, it filed its answer to the bill (record, pp. 68–75).

Other bond-holders filed answers and cross-bills, and the cause was submitted thereon, and on proofs taken by all the parties, and upon a certain stipulation that each defendant is, and was at the commencement of the suit, the *bona fide* holder of the bonds as set up and specified in the respective answers; that they purchased the same for value without any notice of defense (record, p. 133).

The answer filed by the German Savings Bank was adopted by other defendants as far as applicable.

This answer puts in issue the material averments of the bill; shows that the bank was a *bona fide holder* for value, without notice of any defense or irregularity; avers that said county and its inhabitants failed to interfere to enjoin the issue of said bonds when they were being executed, but acquiesced in the issue of said bonds; that said county and its inhabitants had, before the purchase of said bonds by defendant, submitted to taxation to pay interest accrued on said bonds, and that after said purchase one installment of interest had been paid.

That shares of stock of said railroad company were received by Franklin county in payment for the bonds, and that the county has ever since held and owned the the same, and by virtue thereof has participated in the elections of officers of the railroad company, and in all other benefits attending such ownership. The answer further states that on the 14th of July, 1879, the county of Franklin, by its board of supervisors, entered into a written agreement with the Belleville & Eldorado Railroad Company and James Hill & Co., contractors for

the construction of the railroad; and defendant avers, upon information and belief, that the said contract was executed and the bonds delivered in pursuance thereof. The contract referred to is at pages 189-191, printed record.

The defendant prays that, as to the bonds and coupons held by it, complainant's bill may be dismissed for want of equity, and that injunction may be dissolved, etc.

On the 3d day of July, 1883, a decree was entered declaring that all of the bonds involved in the cause, and purporting on their face to have been issued under the provisions of the railroad act of November 6th, 1849, were issued without authority of law, and are therefore void, and ordering and decreeing as to such holders of said bonds that the injunction heretofore issued be made perpetual (record pp. 194, 195).

Among the bonds so declared void, the nine bonds of $1,000.00 each (of that issue), held by the German Savings Bank, are specifically described. The decree then proceeds to describe the various bonds, by number and name of owner, issued under the charter of said Belleville & Eldorado Railroad Company, approved February 22d, 1861, and states that "the court doth decree in "favor of said defendants, the said several respective "holders thereof, and that the said several bonds and "the coupons thereof are valid and legal obligations as "against the county of Franklin; and as to said last "mentioned series of bonds and coupons thereto at-"tached, as held as aforesaid, the court doth decree that "the injunction issued in this cause be dissolved, and "complainant's said bill be dismissed for want of "equity."

On the 12th of June, 1885, the German Savings Bank, of Davenport, Iowa, owning $9,000.00 (face value) of the bonds issued under the act of 1849, and declared void, appealed from the decree (record, pp. 199, 200).

No other holder of the bonds appealed, nor did the county of Franklin appeal from the decree establishing the validity of the bonds issued under the act of 1861.

Therefore the only question presented to this court by this appeal is concerning the validity of the nine bonds held by the German Savings Bank, issued under the law of 1849.

No opinion was filed in the case. The decision was announced by Mr. Justice Harlan, at Chicago, in June, 1883. He was understood to say, in announcing the decision, that so far as the election of 1869 was authorized by the act of November 6th, 1849, it was unaffected by the constitution of 1870, as the proviso expressly declared that the adoption of the section should not be considered as affecting the right of any municipality to make subscriptions where the same had been authorized under existing laws by a vote of its people prior to such adoption. That proviso did not prevent the legislature from withholding from municipalities which had so voted authority to make and pay subscriptions which had not been consummated by a contract between the municipality and the railroad company. The repeal by the act of March 31, 1874, of the act of November 6th, 1849, had the effect to withdraw from the county the right to pay its proposed subscription by an issue of bonds. For these reasons it was held that there was an entire want of power in the county to issue bonds under the act of

1849. The county was liable upon the bonds issued under the act of February 21st, 1861, because that act did not prescribe the particular mode in which subscriptions should be paid.

SPECIFICATION OF ERRORS.

There is manifest error in the record and proceedings of the court below, in this:

First. That the court decreed that bonds numbered fifteen (15), eighteen (18), thirty-nine (39), forty (40), forty-one (41), forty-two (42), forty-three, (43), forty-five (45), and forty-six (46), held by the German Savings Bank, of Davenport, Iowa, for $1,000.00 each, and of the series of bonds in complainant's bill described, and purporting on their face to have been issued under the provisions of the railroad act of November 6th, 1849, and the coupons thereto attached, were issued without authority of law, and are therefore void, and that the injunction theretofore issued should be made perpetual as against the said German Savings Bank, holder of said nine bonds.

Second. That the court did not decree that said nine bonds, particularly described in the first specification of error, and belonging to the said German Savings Bank, and the coupons thereof, were valid and legal obligations as against the said county of Franklin; and that the injunction theretofore issued should be dissolved as against the German Savings Bank, holder of said nine bonds, and that as to said bonds complainant's bill should be dismissed for want of equity.

BRIEF OF POINTS AND AUTHORITIES.

FIRST.

The repeal of the act of November 6th, 1849 (under which these bonds were issued), by the act of the general assembly of Illinois of March 31st, 1874, Chapter 131, pages 1012, *et seq.*, of revised statutes of Illinois of 1874, did not deprive the county of Franklin of the power to issue the bonds in pursuance of a vote of the people taken in November, 1869.

The second section of said repealing act contained a saving clause. (Said section is printed under the first point of the argument, pp. 17 post.)

At the time said repealing act was passed there was a statute of Illinois, passed by the same legislature, on the 17th of March, 1874, extending the time beyond which municipalities should not be held liable to issue aid for building any railroad in pursuance of any vote taken in conformity to the laws of the state, viz.: the first day of April, 1877. (The act is printed under the first point of the argument, pp. 18–19 post.)

On the 29th day of May, 1877, the legislature amended the last named act, extending the time to July 1st, 1880. (Printed at p. 19 post.)

The repealing act and the other two acts referred to must be construed together. It then becomes apparent that the *power* of Franklin county to issue the bonds existed at the date of the execution and delivery of the bonds.

Comments upon these statutes extending the time will be found in—

Fairfield v. *County of Gallatin*, 100 U. S., 47, on p. 51.

Cases decided by this court touching the effect of the prohibition by the constitution of Illinois of 1870, against municipalities subscribing to the capital stock of any railroad are in some respects applicable to this point.

The County of Moultrie v. *Rockingham Ten Cent Savings Bank*, 92 U. S., 631.
Pana v. *Bowler*, 107 U. S., 529, 539.
Insurance Co. v. *Brewer*, 105 U. S., 328.
Oregon v. *Jennings*, 119 U. S., 74.

SECOND.

The constitution of Illinois of 1870 continued the power to issue bonds in compliance with the vote of the legal voters of a county taken prior to the adoption of that constitution, on the 2d day of July, 1870. And the bonds in this case having been issued after the adoption of such constitution, and containing recitals that they were "issued under the provisions of an act "of the general assembly of the state of Illinois, en- "titled, An act to authorize cities and counties to sub- "scribe stock to railroads, approved November 6th, "A. D. 1849, and authorized by a majority of the quali- "fied voters of said county of Franklin at an election "held in said county on the 11th day of September, A. "D. 1869, in accordance with the provisions of said "act" (record, pp. 133, 134), the county was not with-

out authority to issue said bonds, although the railroad may not have been completed within the time provided by the order for the vote. The county is estopped by the recitals in the bonds to deny its liability thereon.

Reference is made to the cases cited under the first point in this brief.

The case of *Richeson* v. *The People, ex rel.*, 115 Illinois, 450, has been decided since this appeal was taken, and holds in opposition to the decisions of this court herein referred to as to the effect of the constitutional provisions.

That case refers to *Middleport* v. *Ætna Life Insurance Co.*, 82 Illinois, 562, which was decided by the supreme court of Illinois before the bonds in controversy in the case at bar were issued.

The only point *decided* in *Middleport* v. *Ætna Life Insurance Co.*, *supra*, was that the law authorized the *donation of money* by the town to aid in the construction of a railroad, and provided for levying a tax to raise the amount to be donated, and that the town *never had any power* to issue the bonds.

That decision was not upon any point involved in this case.

THIRD.

Even if these bonds were in fact issued in violation of some of the terms and conditions upon which they were voted and subscribed, they are not void under Section 7 of the act of the general assembly of Illinois, entitled, "An act to fund and provide for paying the

"railroad debts of counties, townships, cities, and "towns," which took effect April 16th, 1869 (Rev. Stat. Ill. of 1874, pp. 791–795).

Said Section 7 is printed under the third point of the argument, pp. 33–34 post.

The particular part of the section relied upon by complainant is as follows: " * * * * and any "county, township, city, or town shall have the right, "upon making any subscription or donation to any rail- "road company, to prescribe the conditions upon which "such bonds, subscriptions, or donations shall be made, "and such bonds, subscriptions, or donations shall not "be valid and binding until such conditions precedent "shall have been complied with."

The case of *Town of Eagle* v. *Kohn*, 84 Illinois, 292, was decided by the supreme court of Illinois at the September term, 1876, before the bonds now in controversy were issued.

It is claimed by complainant that the case decided that where bonds were not issued in compliance with the conditions they were void, even in the hands of innocent holders.

That decision does not apply to the bonds here in controversy; *first*, because it does not appear that the bonds in that case contained any recitals that they were issued in pursuance of any authorized vote, or that the conditions had been complied with; *secondly*, because the case does not show that any of the bonds had been registered by the state auditor, as Section 7 contemplates.

The bonds here in controversy were so registered (printed record, p. 134).

Section 7 requires certain reports to be made to the state auditor, certifying under oath that all the preliminary conditions have been complied with; "and there-"upon the said bonds *shall be subject to registration by* "*the state auditor*, as hereinbefore provided."

The action of the auditor is of a *quasi judicial* character, and his action can not be impeached or questioned in a collateral proceeding.

> *Commissioners of Knox County* v. *Aspinwall*, 21 How., 539.

It must have been the legislative intention that the registration of the bonds should settle the question of compliance with conditions precedent.

The supreme court of Illinois has never decided that where bonds were so registered they would be void in the hands of a *bona fide* holder for value, if the conditions upon which the bonds were to be issued had not in fact been complied with.

The case of *Oregon* v. *Jennings*, 119 U. S., 74, on pages 91–93, passes upon the effect of said Section 7, and holds that under the recitals in the bonds, in the hands of a *bona fide* holder, the town is estopped from asserting that the conditions prescribed by the popular vote were not complied with.

Moreover, there was in this case an express written agreement between the county and the railroad company,

whereby $150,000.00 (instead of $200,000.00) of bonds should be issued, and the time for the completion of the road extended to November 1st, 1879 (record, pp. 188–192).

And the railroad was completed in that time (deposition of W. R. Ward, p. 157, record).

The county had the right to make a contract for such extension of time.

County of Randolph v. *Post*, 93 U. S., 502.

FOURTH.

If the county of Franklin had the power to issue these bonds, then, even if grave irregularities attended the exercise of such power, the county may be estopped by the payment of interest and by other facts indicating acquiescence and ratification.

Before these bonds were issued the county of Franklin had filed a bill against the Belleville & Eldorado Railroad Company, and others, to enjoin their issue. That suit was settled and dismissed by order of the board of supervisors, and a contract entered into between the county and the railroad company for the completion of the railroad through Benton county, and for the delivery of $150,000.00 of the county's bonds to the railroad company, being $50,000.00 less than the amount of bonds originally voted. Order and contract will be found at pages 188–192, record.

The county also received from the railroad company, in exchange for the bonds, certificates of stock issued

by the railroad company, and the board of supervisors ordered that such certificates be delivered by its clerk to the treasurer of the county (record, p. 192, second paragraph from bottom).

Taxes were afterwards levied and collected to pay the interest (averments of bill, p. 18, record).

And the first installment of interest which fell due after the bonds were purchased by the German Savings Bank was paid (deposition of G. G. Carstens, p. 143, folio 354, record).

As to the effect of the levy of a tax and payment of interest, reference is made to case of —

Supervisors v. *Schenck*, 5 Wall., 772.

As to effect of contract extending time of completion of road, reference is made to —

County of Randolph v. *Post*, 93 U. S., 502.

ARGUMENT.

FIRST.

The most important question upon this appeal is as to the effect of the repeal of the act of November 6th, 1849. The decree of the circuit court finds that the bonds in controversy, issued under that act, were issued *without authority of law*, and are therefore void. This result was reached solely upon the ground that the act had been repealed by act of the general assembly of March 31st, 1874, Chapter 131, pages 1012, *et seq.*, of

revised statutes of Illinois of 1874. By this Chapter nearly nine hundred acts are repealed.

On page 1046 is a saving clause, a copy whereof here follows:

"SECTION 2. The repeal of the acts and parts of acts mentioned in the preceding section shall not affect suits pending or rights existing at the time this act takes effect, and as to all corporations, municipal or private, heretofore formed under any act of incorporation mentioned in the preceding section, such act of incorporation, and all amendments thereof, shall continue in force to the same extent and with like effect as if the same had not been repealed by this act, nor shall such repeal as above mentioned be taken, construed, or held to avoid or impair any grant made or right acquired or cause of action now existing under any such acts or the amendments thereto; but as to all grants made or rights acquired, or causes of action now existing, said laws shall be continued in full force and effect. And all deeds or other instruments of writing affecting real estate which have been proved or acknowledged according to any law in force at the time such proof or acknowledgment was made may be recorded, and the same, or a certified copy of the record thereof, be read in evidence, notwithstanding the repeal of such laws by this or any other act of this or the twenty-seventh general assembly. And when any limitation law has been revised by this or the twenty-seventh general assembly, and the former limitation law repealed, such repeal shall not be construed so as to stop the running of any statute, but the time shall be construed as if such repeal had not been made."

On the 17th of March, 1874, the legislature of Illinois passed an act extending the time beyond which municipalities should not be held liable to issue aid for

building any railroad in pursuance of any vote taken in conformity to the laws of the state, viz.: the 1st day of April, 1877.

Revised statutes of Illinois, 1874, p. 797. That law is as follows:

"SECTION 1. *Be it enacted, etc.:* That the liability of all counties, cities, townships, towns, or precincts, which have voted aid, donations, or subscriptions to the capital stock of or to any railroad company, in conformity to the laws of this state, for the building of or in aid of the building of any railroad to, into, through, or near such county, city, township, town, or precinct, to issue such voted aid, shall cease and determine upon and after the expiration of the term of three years from and after the first day of July next; and no bonds shall be issued or stock subscribed to any such railroad company after such time upon account of or upon the authority of such vote: *Provided*, this act shall not apply in any case where the express conditions of the vote for such aid shall extend the time for the aforesaid building beyond the time aforesaid; *and it is further provided*, that it shall not apply in any case where the aid voted shall have been or shall be already issued within the period aforesaid, and paid over to such railroad company or their legal representatives, or in any case where any railroad shall have been or shall be built within said period, in accordance with the conditions of the vote for aid to such railroad; *and it is further provided*, that it shall not apply to any case where such aid shall have been or shall be deposited within said period with any trustee or trustees, upon written or printed conditions, to be delivered to such railroad company at some future time: *Provided further*, that this act shall not be construed so as to require any county, city, township, town, or precinct to issue, pay, or deliver any such aid or bonds where the same may have been

voted upon any condition or conditions which are not complied with within the time expressed in the notice of election, proceedings, or vote authorizing such aid to be paid or given."

This act was not repealed by the repealing statute of March 31st, 1874, already cited.

On the 29th day of May, 1877, the legislature of Illinois amended this act (Laws of Illinois, 1877 [Bradwell], p. 144), as follows:

"SECTION 1. *Be it enacted by the people of the state of Illinois, represented in the general assembly:* That an act entitled, 'An act to limit and determine the time for which counties, cities, townships, towns, and precincts in this state shall be liable and holden to issue aid for the building of any railroad in pursuance of any vote taken in conformity to the laws of this state,' approved March 17th, 1874, be amended so as to read as follows: 'That the liability of all counties, cities, townships, towns, or precincts which have voted aid or donations to, or subscriptions to the capital stock of, any railroad company, in conformity to the laws of this state, for the building or in aid of the building of any railroad to, into, through, or near such county, city, township, town, or precinct, to issue such voted aid, shall cease and determine upon and after the 1st day of July, A. D. 1880; and no bonds shall be issued or stock subscribed to any such railroad company after that date upon account of or upon the authority of such vote: *Provided*, this act shall not apply in any case where the express conditions of the vote for such aid shall extend the time for the building of such railroad beyond the said date; *and it is further provided*, that this act shall not apply in any case where any railroad shall have been built, or shall before said date be built, in accordance with the conditions of the vote for aid to such railroad; *and it is*

further provided, that this act shall not apply to any case where such aid shall have been deposited, or shall before said date be deposited, with any trustee or trustees, upon written or printed conditions, to be delivered to said railroad company at some future time. *Provided further*, that this act shall not be construed so as to require any county, city, township, town, or precinct to issue, pay, or deliver any such aid or bonds, where the same may have been voted and subscribed, upon any condition or conditions which shall not be complied with within the time expressed in the notice of election, proceedings, or vote authorizing such aid to be paid or given.' "

On the 6th day of November, 1869, the county court of Franklin county entered an order, the material part of which is as follows:

"It is considered and ordered by the court that by "authority of the vote at the election aforesaid, held in "the county of Franklin on the 11th day of September, "A. D. 1869, and by authority of an act of the general "assembly of the state of Illinois, entitled, An act to "incorporate the Belleville & Eldorado Railroad Com- "pany, approved February 22d, A. D. 1861, and an act "of the said general assembly, approved November the "6th, A. D. 1849, authorizing counties to take stock in "railroad companies, that the county of Franklin, in "the state of Illinois, does hereby subscribe to the "capital stock of the Belleville & Eldorado Railroad "Company the sum of $100,000.00, by virtue of the said "act of the general assembly of the state of Illinois, "entitled, An act to incorporate the Belleville & El- "dorado Railroad Company, approved February 22d, A. "D. 1861; and the further sum of $100,000.00 by virtue

"of an act of the said general assembly, approved No-
"vember 6th, A. D. 1849, authorizing counties to take
"stock in railroad companies, making a total of $200,
"000.00 hereby subscribed to the capital stock of the
"Belleville & Eldorado Railroad Company; that said
"capital stock subscribed as aforesaid be payable in the
"bonds of the county of Franklin at par * * * *"
(printed record, p. 160).

The various subsequent acts of the county court and board of supervisors in relation to the issue of the bonds are fully stated at pages 161–193 of the printed record, in the order of their occurrence, but it is not deemed necessary to make detailed reference to them in this connection.

The repealing act of March 31st, 1874, and the act of March 17th, 1874, must be considered together.

It appears that the legislature not only did not intend by the repeal of the act of 1849 to destroy the power of municipalities to issue bonds under aid previously voted, but it expressly recognizes the existence of such power, and again extended the duration of such power by the act of May 29th, 1877, before quoted. Although no *vote* could have been taken after July 2d, 1870, yet these acts provided for an extension of the time of making such subscriptions, and issuing bonds under a vote previously taken, to the 1st day of July, 1880, a period of almost ten years.

These statutes extended the time, but in no way limited the power which existed at the time the vote was taken; nor do they limit the power of the county au-

thorities to extend the time for the completion of a road beyond that contemplated in the notice of election.

The last proviso in the amendatory act of May 29th, 1877, enacts, in substance, that the act shall not be so construed as to compel municipalities to deliver aid or bonds without compliance with the conditions expressed in the notice of election preceding the vote authorizing such aid to be paid or given; but it does not provide that such municipalities may not, by their proper officers, extend the time and waive other conditions.

These statutes are commented upon by this court in the case of—

Fairfield v. *County of Gallatin*, 100 U. S., 47, on p. 51.

It can not be doubted that at the time these bonds were issued counties which had voted aid to railroads before July 2d, 1870, still retained the power to issue bonds in conformity with the vote. If they had subscribed for stock, they had the right to complete the contract of subscription by issuing bonds.

Power to issue bonds existed; the legislature had provided certain conditions upon which the power might be exercised.

If certain *facts* existed, then the county might issue the bonds. Whether or not such facts did exist, whether or not the conditions upon which the tax was voted had been complied with, were questions to be determined by the county authorities; and when they decided that such facts did exist, and issued the bonds reciting the

existence of the necessary conditions to authorize the exercise of the power, innocent holders of said bonds, for value, are protected against a denial by the county of the truth of the recitals.

The form of the bonds in controversy is fully set forth, marked "Exhibit A," on pages 133, 134, printed record. The material recital in the bond is as follows: "This bond is one of a series of fifty of like tenor, for "the sum of one thousand dollars each, numbered from "one to fifty, inclusive, issued under the provisions of "an act of the general assembly of the state of Illinois, "entitled, 'An act to authorize cities and counties to "'subscribe stock to railroads,' approved November 6th, "A. D. 1849, and authorized by a majority of the quali-"fied voters of said county of Franklin at an election "held in said county on the 11th day of September, A. "D. 1869, in accordance with the provisions of said "act" (printed record, p. 134). These bonds were duly registered in the office of the auditor of public accounts of the state of Illinois, as provided by statute (printed record, p. 134).

In the case of *County of Moultrie* v. *Rockingham Ten Cent Savings Bank*, 92 U. S., 631, this court says (on page 637), in considering the effect of the prohibition by the new constitution of Illinois against counties subscribing to the capital stock of any railroad, "How, "then, can the county be permitted to set up against a "*bona fide* holder of the bonds that the authority to "make a subscription, with all its legitimate conse-"quences, had expired before the subscription was made "in the face of the recitals and of the county records?

"Whether it had expired was a matter of fact, not of "law; and it was peculiarly, if not exclusively, within "the knowledge of the board of supervisors. After "having assured a purchaser that their subscription was "made in December, 1869, when they had power to make "it, it would be tolerating a fraud to permit the county "to set up, when called upon for payment, that it was "not made until after July 2d, 1870, when their au- "thority expired."

In *Pana* v. *Bowler*, 107 U. S., 529, 539, this court upheld the effectiveness of a recital in bonds, in favor of a *bona fide* holder, as against an alleged defect in the mode of conducting an election, held prior to the adoption of the same constitution of Illinois, the bonds being issued after its adoption, although that instrument forbade the issuing of the bonds, unless their issue should have been authorized under then existing laws, by a vote of the people prior to the adoption of the constitution.

In the case of *Insurance Co.* v. *Bruce*, 105 U. S., 328, it was held that recitals in bonds estopped a town in Illinois, as against a *bona fide* holder, from showing that conditions imposed on its liability by the vote of the people had not been complied with, although the statute declared that the bonds should not be valid and binding until such conditions precedent had been complied with.

In *Oregon* v. *Jennings*, 119 U. S., 74, the bonds were issued after the constitution of Illinois of 1870 took effect, in compliance with a vote of the people held prior to the adoption of that constitution, in pursuance of a

law providing therefor, within the meaning of Section 12, of Article 9, of that constitution, although the condition as to the completion of the road was not complied with, because, as against the plaintiff, the recitals in the bonds were made by officers entrusted, under the statute, with the duty of determining whether the condition had been complied with, and the town was thereby estopped from asserting the contrary.

The section of the constitution of Illinois referred to in the cases cited is as follows:

"No county, city, town, township, or other municipality "shall ever become subscriber to the capital stock of any "railroad or private corporation, or make donation to, or "loan its credit in aid of, such corporation. Provided, "however, that the adoption of this article shall not be "construed as affecting the right of any such municipality to make such subscriptions, where the same have "been authorized under existing laws, by a vote of the "people of such municipalities, prior to such adoption."

The *power* to make such subscriptions, or give aid to railroad corporations, was taken away by the very terms of this constitutional provision, excepting where the same had been authorized under existing laws by a vote of the people.

Under such exception a *power* to issue bonds was left in municipalities.

The result of the decisions of this court already cited clearly is, that even if there had been no legal election, or if there had been irregularities, it does not follow that there was no authority to issue the bonds after the con-

stitution went into effect. The converse of this proposition was urged in the case of *Pana* v. *Bowler*, *supra*, but this court said (on page 539):

"We cannot assent to this conclusion. It is clear "that this case *in no wise differs* from other cases where "the holding of an election and a vote of the people in "favor of an issue of bonds is made by law a condition "precedent upon which the authority to issue bonds rests. "The bonds in question in this case recite on their face "that they were issued by the township, in compliance "with the vote of the legal voters thereof, at an election "held on April 30th, 1870, under and by virtue of the "authority conferred by acts of the general assembly of "the state of Illinois, specifying the acts of February "26th, 1867, and February 24th, 1869, above mentioned. "This court has again and again decided that if a "municipal body has lawful power to issue bonds or "other negotiable securities, dependent only upon the "adoption of certain preliminary proceedings, such as a "popular election of the constituent body, the holder in "good faith has the right to assume that such prelimi- "nary proceedings have taken place, if the fact be certi- "fied on the face of the bonds by the authorities whose "primary duty it is to ascertain it."

Now, the act of March 17th, 1874, as amended by the act of May 29th, 1877 (hereinbefore fully set out), *continues the power* of all municipalities which have voted aid or donations to, or subscriptions to the capital stock of, any railroad company, "*in conformity to the laws of* "*this state*," until the 1st day of July, 1880.

The questions whether or not elections had been regularly held or subscriptions had been made "in conformity to the laws of this state" were to be determined by the proper county authorities.

The last proviso in the act of May 29, 1877, is: "That this act shall not be construed so as to require "any county * * * to issue * * any such aid "or bonds, where the same may have been voted and "subscribed, upon any condition or conditions which "shall not be complied with within the time expressed "in the notice of election, proceedings, or vote authorizing such aid to be paid or given."

The question whether or not such conditions have been complied with is also to be determined by the county authorities.

It is to be observed that this proviso does not even assume to declare that there shall be no *power* to issue bonds where the conditions have not been complied with, but only provides that the act shall not be construed so as to *require* any municipality to issue bonds under such circumstances.

The decisions of this court construing the constitutional provision before quoted, and stating the effect of a recital in the bonds that the conditions have been complied with, apply in full force to the questions raised under these statutes, and upon these bonds.

Here, as we have seen, the people of Franklin county voted upon the question of subscribing for stock and issuing bonds. There were no irregularities in the election. A subscription was regularly ordered. It

now appears that the original conditions were not, in fact, complied with, but new arrangements were made between the county authorities and the railroad company, whereby $50,000.00 less stock than was originally authorized was subscribed for, and the road completed as originally required, but not within the time required.

But there was nothing on the face of the bonds to indicate that any such changes had been made in the conditions, or that the time of completing the road had been extended beyond the time contemplated by the order for the election.

On the contrary, the county authorities, whose duty it was to determine those questions of fact, issued the bonds bearing upon their face the most solemn assurances that everything was regular and legal.

It is respectfully suggested that the court below did did not give due consideration to the point that, notwithstanding the repeal of the general act of November 6th, 1849, the *power* to issue bonds previously voted under the act of 1849 still existed. The saving clause of the repealing act provided that the repeal should not affect "rights existing at the time this act takes effect."

One of the "rights existing" at that time was the right of any county (under the act of March 17th, 1874) which had voted aid or subscriptions to the capital stock of any railroad company to have its liability continue, and to issue its bonds; and the right of the railroad companies to receive such bonds existed and continued, notwithstanding the repeal.

If the provisions of the act of March 17th, 1874, had been added as a proviso to the saving clause of the repealing act, it would more forcibly appear that the *power* to issue bonds still existed; but the legal effect of the acts as they were separately passed is the same.

And the two acts, taken together, practically leave the municipalities in the same position as they were placed by the constitutional provision hereinbefore referred to as to the power to issue bonds in accordance with their previous liability.

The court below should have held that the *power* to issue bonds still existed, upon certain conditions, and that the determination by the county authorities that such conditions existed, and the recitals in the bonds that they were issued in accordance with the law imposing such liability, were conclusive upon the county.

SECOND.

It was argued in the court below by complainant that the present constitution of Illinois permitted counties to subscribe aid to railroads only when they were authorized to do so by a vote of the people previous to the adoption of that constitution, on the 2d of July, 1870; and that in this case the time fixed by the conditions of the vote and the order of the county court subscribing to the stock expired long before the building of the railroad was commenced in Franklin county, and therefore the constitution deprived that county of the power to issue the bonds. The same argument will, doubtless, be urged here.

Much which has been said under the first point of this argument, and the authorities there cited, will be applicable here.

A particular reference to some of these authorities is made under this point.

In the case of *Fairfield* v. *County of Gallatin*, 100 U. S., 47 (overruling *Town of Concord* v. *Portsmouth Savings Bank*, 92 U. S., 625), it was decided that where, pursuant to authority conferred by a legislative enactment, a donation was voted by a county in Illinois before the adoption of the constitution of 1870, the donation may thereafter be completed by the issue of the requisite bonds.

In *Pana* v. *Bowler*, 107 U. S., 529, on page 539, this court held, construing the same constitutional provision now under discussion, that the township of Pana was not without authority to issue the bonds there in controversy because there was no legal election, the bonds reciting that they were issued in compliance with the vote of the legal voters.

In that case it was also insisted that this court was bound to follow the decision of the supreme court of Illinois, and hold the bonds in question void.

This court says, on pages 540, 541: "We do not so "understand our duty. Where the construction of a "state constitution or law has become settled by the "decision of the state courts, the courts of the United "States will, as a general rule, accept it as evidence of "what the local law is. Thus we may be required to "yield, against our own judgment, to the proposition that,

" under the charter of the railway company, the election " in this case, which was held under the supervision of " a moderator chosen by the electors present, was irregu- " lar, and therefore void. But we are not bound to ac- " cept the inference drawn by the supreme court of Illi- " nois, that in consequence of such irregularity in the " election the bonds issued in pursuance of it by the " officers of the township, which recite on their face that " the election was held in accordance with the statute, " are void in the hands of *bona fide* holders. This latter " proposition is one which falls among the general prin- " ciples and doctrines of commercial jurisprudence, upon " which it is our duty to form an independent judgment, " and in respect of which we are under no obligation to " follow implicitly the conclusions of any other court, " however learned or able it may be " (citing numerous authorities).

In *Oregon* v. *Jennings*, 119 U. S., 74, one of the conditions of the vote was that the railroad should be completed by a certain date, but that condition was not complied with.

The bonds were held to be valid in the hands of a *bona fide* holder.

That case is directly in point upon the question in the case at bar, as to the effect of the failure to complete the road within the time specified in the order for the vote.

Since the appeal in this case the supreme court of Illinois has decided the case of *Richeson* v. *The People, ex rel.*, 115 Illinois, 450. That case involved the validity of the bonds issued by Franklin county under

the act of February 22d, 1861 — the same class of bonds of which some were held by the German Savings Bank, and their validity finally established by the decree in this case.

The case holds that the constitution of Illinois of 1870 prohibits municipal corporations from making subscriptions or donations to any railroad corporation except when authorized, under prior laws, by a vote of the people, and when so authorized the subscription must be in accordance with the conditions upon which it was voted. After the adoption of the constitution, the conditions upon which such a subscription was voted can not be changed, and a subscription made upon other and different conditions.

In regard to this case it is only necessary to observe that it is opposed to the uniform decisions of this court, already referred to, and that its principles ought not to govern the decision of the case at bar.

That case (*Richeson* v. *The People*) refers to the case of *Middleport* v. *Ætna Life Insurance Co.*, 82 Ill., 562.

The only point *decided* in the last named case was that the law authorized the *donation of money* by the town to aid in the construction of a railroad, and provided for *levying a tax* to raise the amount to be donated, and that the officers of the corporation could not adopt any other mode of paying the same, and bonds issued by them for the purpose of paying such indebtedness are void. The decision is put distinctly on the ground that the town never had any power to issue the bonds. In the opinion, on page 568, the court says, *arguendo*:

"It is apprehended the obligations assumed under exist-
"ing laws can not, since the adoption of the constitution,
"be enlarged or materially changed, either by the action
"of the people of the township or its corporate authori-
"ties. All power is taken away, and the utmost that
"can be done is to make and complete the subscription
"or donation previously voted under then existing laws
"upon the same terms and conditions as voted. Sub-
"scriptions or donations upon other terms would ob-
"viously require new consent on the part of the people
"of the municipality, which cannot be had for want of
"power."

Comments such as these, in a case where the power to issue the bonds in controversy never existed, cannot be regarded as a *decision* of the court upon the effect of the constitutional provision upon bonds which the municipality, at some previous time, had the power to issue under the law, in pursuance of a vote of the people authorized by law.

THIRD.

It is also urged by the complainant that these bonds were in fact issued in violation of the terms and conditions on which they were voted and subscribed, and are void under Section 7 of an act of the general assembly of Illinois, which took effect April 16th, 1869. This act will be found in the revised statutes of Illinois of 1874, at pages 791–795.

The section relied upon is as follows:

"SECTION 7. And it shall not be lawful to register any bonds under the provisions of this act, or to receive

any of the benefits or advantages to be derived from this act, until after the railroad, in aid of the construction of which the debt was incurred, shall have been completed near to or in such county, township, city, or town, and cars shall have run thereon; and none of the benefits, advantages, or provisions of this act shall apply to any debt, unless the subscription or donation creating such debt was first submitted to an election of the legal voters of said county, township, city, or town under the provisions of the laws of this state, and a majority of the legal voters living in said county, township, city, or town were in favor of such aid, subscription, or donation; and any county, township, city, or town shall have the right, upon making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds, subscriptions, or donations shall be made, and such bonds, subscriptions, or donations shall not be valid and binding until such conditions precedent shall have been complied with. And the presiding judge of the county court, or the supervisor of the township, or the chief executive officer of the city or town, that shall have issued bonds to any railway or railways, immediately upon the completion of the same near to, into, or through such county, township, city, or town, as may have been agreed upon, and the running of the cars thereon, shall certify under oath that all the preliminary conditions in this act required to be done to authorize the registration of such bonds and to entitle them to the benefits of this act, have been complied with, and shall transmit the same to the state auditor, with a statement of the date, amount, number, maturity, and rate of interest of such bonds, and to what company, and under what law issued; and thereupon the said bonds shall be subject to registration by the state auditor, as hereinbefore provided."

Complainant relies upon the case of *Town of Eagle* v. *Kohn*, 84 Ill., 292, which was decided at the Septem-

ber term, 1876. It is claimed by complainant that this case decided that municipal bonds issued upon a subscription to a railway company, with conditions annexed upon which the bonds were to be issued, are not valid and binding, even in the hands of an innocent holder, for value, where the conditions named have not been complied with. And it is further claimed that as the bonds in controversy were not issued until November, 1877, some time after this decision, their validity must be tested by that decision, and that, under its doctrine, these bonds are void.

The contention of appellant is that the case cited has no application to its bonds; and it is submitted that a careful consideration of that case will establish appellant's position. In the first place it does not appear that the bonds in controversy in that case contained any recitals whatever that they were issued in pursuance of any authorized vote, or that the conditions had been complied with. The case does show that the bonds were negotiable and in possession of *bona fide* holders; but the bonds might be negotiable without containing any such recitals. Secondly, the case does not show that any of the bonds there in controversy had been registered by the state auditor, as contemplated by said section 7.

Therefore the decision does not touch the question of the effect of recitals such as are found in the case at bar, nor the very important question as to the effect of the registration of the bonds under section 7.

As to the effect of such registration, the attention of the court is now asked.

The printed record, page 134, shows a certificate, as follows:

"AUDITOR'S OFFICE, ILLINOIS,
"SPRINGFIELD, October 24th, 1879.

"I, Thomas B. Needles, auditor of public accounts of "the state of Illinois, do hereby certify that the within "bond has been registered in this office this day, pur- "suant to the provisions of an act entitled, 'An act to "'fund and provide for paying the railroad debts of "'counties, townships, cities, and towns,' in force April "16th, 1869

"In testimony whereof, I hereunto subscribe my name "and affix the seal of my office, at Springfield, the day "and year first above written.

"(Signed.) "T. B. NEEDLES,
"[SEAL.] "*Auditor Public Accounts.*"

This certificate was endorsed on each bond in controversy. The railroad had been completed through Franklin county at the time this certificate was made (printed record, p. 157 — deposition of W. R. Ward).

Said Section 7 does enact (in substance) that subscriptions shall not be valid and binding until the conditions precedent shall have been complied with. But it also provides a method whereby the question whether or not such conditions have been complied with shall be determined and such *decision made a matter of record.* It requires certain reports to be made to the auditor of public accounts, certifying under oath that all the preliminary conditions have been complied with; "and "thereupon the said bonds *shall be subject to registra-* "*tion* by the state auditor, as hereinbefore provided."

The method so provided is stated in the second section of said act of April 16th, 1869, which section is, in full, as follows:

"SECTION 2. And the county clerk, or other proper officer, upon the issuing of the bonds in payment of said railroad debt, shall make a registration thereof in a book to be kept for that purpose in his office, showing the date, amount, number, maturity, and rate of interest of such bonds, and upon the subscription or donation, to what railroad the same was given. And the said bonds, and bonds heretofore issued and still unpaid, in order to receive the benefits of this act, shall be registered by the holder thereof at the office of the auditor of public accounts, who shall cause the same to be registered in a book kept for that purpose. Such registration shall show the date, amount, number, maturity, and rate of interest of such bond, under what act and by what county, township, city, or town issued; and the auditor shall, under his seal of office, certify upon such bond the fact of such registration; for which registration and certificate the auditor shall be entitled to a fee of $1.00 from the holder of each bond." (Rev. Stat., Ill., 1874, p. 792.)

By the express provision of the first part of Section 7 it "shall not be lawful to register any bonds under "the provisions of this act" until certain things shall have been done.

But when certain evidence is furnished to the auditor, "thereupon the said bonds *shall be subject to registration by the state auditor.*"

This necessarily implies that the auditor shall ascertain and determine whether or not the evidence is suffi-

cient to authorize him to register the bonds, and endorse thereon the certificate of registration. It must be presumed that the officers whose duty it was to certify to the auditor that all the preliminary conditions were complied with performed that duty. Their action, as well as that of the auditor, is of a *quasi judicial* character, under the statute, and their action cannot be impeached or questioned in a collateral proceeding.

In a direct proceeding the registration of the bonds might be prevented or reviewed.

But when the registration was completed without objection, and upon the faith of its validity third persons have acquired rights in the bonds so adjudicated (under the provisions of the statute) to have been issued in accordance with law, the rights of such persons can not be affected by a subsequent showing that some of the facts entitling the bonds to registration did not exist.

In *Commissioners of Knox County* v. *Aspinwall*, 21 How., 539, it was contended that the bonds were not valid because of the omission to comply with the statute in respect to the notices to be given of the election.

On page 544 the court says: "The case assumes "that the requisite notices were not given of the elec- "tion, and hence that the vote has not been in con- "formity with the law. This view would seem to be "decisive against the authority on the part of the board "to issue the bonds, were it not for a question that "underlies it; and that is, who is to determine whether "or not the election has been properly held and a ma- "jority of the votes of the county cast in favor of the

(Insert at page 38 of appellants' argument, in case of the German Savings Bank of Davenport, Iowa, *vs.* the County of Franklin, Ill., No. 305).

Reference is also made to the case of *Lewis* v. *Commissioners*, 105 U. S., 739.

"subscription? Is it to be determined by the court, in "this collateral way, in every suit upon the bond, or "coupon attached, or by the board of commissioners, as "a duty imposed upon it before the making of the sub- "scription?"

The court held that the ascertainment of the fact was necessarily left to the inquiry and judgment of the board itself, "as no other tribunal was provided for the "purpose."

So, in the case at bar, bonds issued after the passage of the law of April 16th, 1869, must be registered in order to entitle them to the benefit of the act. A tribunal is provided to determine whether the conditions precedent upon which the bonds are to issue have been complied with; and the decision of that tribunal, as evidenced by the registration of the bonds, must be conclusive.

It must have been the legislative intention that the registration of the bonds should settle the question of compliance with conditions precedent.

Otherwise, why should the act provide that a certificate should be made to the auditor that all such conditions had been complied with, and that thereupon the bonds "*shall be subject to registration?*"

Is it to be supposed that the legislature intended to charge county and state officials with the duty of determining and certifying upon the bonds to the vital fact that the conditions under which the bonds might be issued had been complied with, and then allow the municipalities to contest each bond upon the ground

that the official certificate was untrue, and some condition (perhaps of trifling importance) had not been complied with?

Certainly the supreme court of Illinois has never decided that under such circumstances the bonds could be shown to be void in the hands of a *bona fide* holder for value.

The case of *Oregon* v. *Jennings*, 119 U. S., 74 (cited under the second point of this argument), on pages 91–93, passed upon the effect of the seventh section of the act of April 16th, 1869.

It holds that under the recitals in the bonds in the hands of a *bona fide* holder, the town is estopped from asserting that the conditions prescribed by the popular vote were not complied with.

In this case the county of Franklin made an agreement in writing, under order of its board of supervisors, with the railroad company, whereby it issued only $150,000.00 of its bonds, instead of $200,000.00 originally subscribed, and extended the time for completing the road to November 1st, 1879 (record, pp. 188–192), and the railroad was completed in that time. (Deposition of W. R. Ward, p. 157, record.) The county had the power to so extend the time and name conditions (*County of Randolph* v. *Post*, 93 U. S., 502), so that even if the the conditions precedent as originally stated were not strictly complied with, the conditions lawfully substituted therefore were observed.

FOURTH.

If the points already stated are good, it is clear that purchasers of these bonds were under no obligation to examine the records of the county court or board of supervisors of Franklin county.

It is not therefore necessary to consider the effect of the various orders made by these tribunals, extending the time for the completion of the road, or modifying any other conditions of the subscription.

However, the attention of the court is called to an order of the board of supervisors, and a certain agreement following, at pages 188–192.

It there appears that on the 4th of June, 1879, a resolution was adopted by the board reciting that a bill in chancery was then pending in the circuit court of Franklin county, in which said county was complainant and the Belleville & Eldorado Railroad Company and others were defendants, to enjoin the delivery of the bonds, and ordering that said suit be dismissed, and authorizing the delivery of the bonds, and the taking of the necessary steps to dismiss the suit.

Then follows an agreement, dated July 16th, 1879, reciting the dismissal of the suit, the gravity of the question of the liability of the county for damages, and providing for the delivery of the bonds. Immediately following the agreement, on pages 191, 192, record, is the resolution of the board accepting the contract, and ordering its extension on behalf of the county.

This agreement and order are suggestive; showing how the inhabitants of Franklin county allowed every-

thing to be done to get the bonds upon the market, and then, after they were sold for full value to innocent purchasers, suddenly discovered that the bonds were void.

Under this agreement all matters in dispute are settled; the county makes a contract to secure the completion of the railroad, the contract is executed, and it is solemnly ordered that the bonds be delivered. That was the time for the tax-payers to have interfered. No tax-payer did file a bill; but the county of Franklin, itself the complainant in the injunction suit which was settled by said order and agreement, after putting these bonds on the market, and securing the completion of the railroad, files another bill to cancel these bonds, and thereby calmly asks this court that the property of the innocent purchasers should be confiscated.

It also appears that the board of supervisors, on November 5th, 1879, ordered the clerk to deliver to the treasurer of the county all the certificates of stock in the Belleville & Eldorado Railroad Company (printed record, p. 192, second paragraph from the bottom).

And at the same meeting of the board, John J. St. Clair (agent appointed by the board) reported that he had delivered the bonds pursuant to contract.

It further appears from the averments of the bill, on page 18, printed record, that taxes were levied and collected to pay interest on these bonds. And the first installment of interest falling due after the bank purchased was paid (deposition of G. G. Carstens, printed record, p. 143, folio 354).

It is not contended, of course, that if these bonds were issued without any power or authority whatever they could be made valid by estoppel; but it is well settled that where the power exists in the municipality to issue bonds, and grave irregularities attend the exercise of such power, the municipality may be estopped by the payment of interest and by other facts indicating acquiescence and ratification.

In case of *Supervisors* v. *Schenck*, 5 Wall., 772, it was held that the levy of a tax and payment of interest by the proper county authorities validates, in the hands of *bona fide* holders for value, county bonds issued, in their origin, irregularly.

In *County of Randolph* v. *Post*, 93 U. S., 502 (cited under third point of argument), the county had subscribed to stock of a railway company, and had agreed to extend the time for completing the road from that originally fixed to a particular date.

On page 513 this court says: "We should unreasonably restrict the rights and powers of a municipal corporation were we to hold that it did not possess the power to alter its legally-made contracts by waiving conditions found to be injurious to its interests, or that it could not estop itself, like other parties to a contract."

Upon the several points presented it is respectfully submitted that the decree of the circuit court as to the validity of the nine bonds in controversy ought to be reversed.

E. E. COOK,
For Appellant.

FILED
DEC 16 1885
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1885.

No. 970.

THE GERMAN SAVINGS BANK, OF DAVENPORT, IOWA, APPELLANT,

vs.

THE COUNTY OF FRANKLIN, IN THE STATE OF ILLINOIS, APPELLEE.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

STATEMENT OF THE CASE. BRIEF AND ARGUMENT FOR APPELLEE.

THOS. J. LAYMAN,
Attorney for Appellee.

JUDD & DETWEILER, PRINTERS, WASHINGTON.

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STATEMENT OF THE CASE.

This suit was commenced in the Franklin county, Illinois, circuit court. The original bill was filed by The County of Franklin, the appellee, against the Belleville and Eldorado Railroad Company, the clerk and collector of said county, the auditor of public accounts of the State of Illinois, the State treasurer, and the unknown holders of the bonds issued to said railroad company in the name of said county, aggregating the sum of $150,000, of which $50,000 purported to be issued under the provisions of the railroad act of November 6th, 1849, and $100,000 purported to be issued in pursuance of the act incorporating the Belleville and Eldorado Railroad Company, approved February 22d, 1861.

The prayer of the bill was that the collection of taxes to pay the bonds or the interest accrued or accruing thereon be enjoined, and the subscription by the county to the railroad company be declared void; and that the unknown holders of said bonds be enjoined from suing on them or the coupons, and that said bonds and coupons be declared void; and that said county clerk be enjoined from extending any tax on the tax books to pay interest on said bonds; and that the auditor be enjoined from computing or certifying to said county clerk any estimate or statement of the amount required to pay interest on said bonds; and that the collector be enjoined from collecting or paying to the State treasurer any taxes to pay interest on said bonds; and that the State treasurer be enjoined from paying any interest on said bonds; and that said bonds be surrendered to said county. The bill also prays for general relief.

At the October term, A. D. 1880, of the Franklin county (Illinois) circuit court a decree was entered according to the prayer of the bill, but subsequently holders of said bonds appeared and had the decree opened. That being done the cause, upon the petition of defendants, citizens of other States, was removed to the circuit court of the United States for the southern district of Illinois, where the cause was heard upon the original bill, answers there to cross-bills, and answers there to replications to answers to original bill and cross-bills, and on proofs taken by the county and the defendants, and a decree was rendered declaring that the bonds purporting to be issued under said act of November 6th, 1849, were issued without any warrant of law and are void; but that the bonds purporting to be issued under said act of February 22d, 1861, are valid and binding against said county, and dismissed the bill as to said bonds purporting to be issued under said act of February 22d, 1861.

From this decree the appellants prosecute this appeal.

The evidence in the case at bar shows that on July 24th, 1869, the county court of said county made an order sub-

mitting a proposition to the voters of said county to be voted on on the 11th day of September, 1869, to subscribe $200,000 to the capital stock of said railroad company, viz., $100,000 under the above-named act of February 22, 1861, and $100,000 under the above-named act of November 6th, 1849; the subscription to be payable in the bonds of said county at par; the bonds to be payable in 20 years from date, with interest payable semi-annually at eight per cent. per annum; the bonds to be of the denomination of not less than $1,000 each.

The bonds were to be issued upon certain conditions named in said order of said county court, and not until they were complied with. One of said conditions is as follows, to wit:

"2nd. That said railroad shall be commenced in the county of Franklin *within nine months from the date of said election, and completed through the county by the first day of June, A. D.* 1872."

On the 6th day of November, 1869, said county court made an order reciting the above-named order of July 24th, 1869, and declaring that a majority of the voters of said county at an election held September 11th, 1869, did vote in favor of said proposition to subscribe $200,000 to the capital stock of said railroad company. Said county court then (in the same order) ordered a subscription of $200,000 to the capital stock of said railroad company, to wit, $100,000 under said act of February 22, 1861, and $100,000 under said act of November 6, 1849, to be payable in the bonds of said county at par; bonds to be due in twenty years from date thereof, and to draw eight per cent. interest, payable semi-annually, the bonds to be of the denomination of not less than $100 each.

The order then proceeds as follows:

"It is further ordered and considered by the court that said bonds are to be issued upon the following conditions, *and never until they are complied with.*"

[This order embraces all the conditions embraced in the above named order of July 24, 1869, and especially the condition above named, to wit:]

"2nd. *That said railroad shall be commenced in the county of Franklin within nine months from the date of said election, and completed through the county by the first day of June, A. D.* 1872."

The above named are all the orders made by said county court subscribing stock to said railroad company or relative thereto, at any time prior to February 6, 1872. We here call attention to the fact that there is nothing in any of the above-named orders of said county court authorizing said subscription to be made on the books of said railroad company, nor is there any evidence in the record showing that said railroad company ever, in any way, assented to or accepted said subscription from said county.

On February 6, 1871, said county court made another order reciting that the above-named order of November 6, 1869, subscribing $200,000 to the capital stock of said railroad company required that said railroad should be commenced in said county within nine months from the date of said election, September 11, 1869, and completed through said county by the 1st day of June, 1872, and that the time for commencing said railroad had expired.

This order of said county court directs that the subscription be made on the stock books of the railroad company, and extends the time for commencing the railroad in said county to January 1, 1872, and for completing it through said county to January 1st, 1874.

This order of February 6, 1871 is the first order of said county court which authorized a subscription to be made on the books of the railroad company, but there is no evidence whatever in the record showing that the subscription was made on the books of said railroad company, or that said railroad company ever, in any way, assented to or accepted said subscription from said county.

On March 9, 1871, said county court made another order, reciting that an election was held September 11th, 1869, &c. Said court then in the same order orders a subscription by the county of $200,000 to the capital stock of said railroad company, to be paid in the bonds of said county; the railroad to be commenced within said county within one year from that date, and completed through said county within three years from that date.

On June 5, 1872, the board of supervisors of said county passed a resolution refusing to issue bonds to be placed in the hands of trustees, &c.

On June 5, 1872, said board of supervisors refused to pass a resolution pledging the county to aid in the construction of said railroad, &c.

The foregoing are all the orders and resolutions made by the county court or board of supervisors of said county subscribing stock to said railroad company, or relative thereto, at any time prior to December 5, 1876, at which time said board of supervisors passed a resolution reciting that there had been a proposition submitted to them (the board of supervisors) to renew the county subscription to said railroad company, and that no action having been taken on it that when the board adjourns, it be to meet again on December 13, 1876.

On December 13, 1876, said board of supervisors made an order subscribing $150,000 to the capital stock of said railroad company, and again changing the terms and conditions of the subscription.

In this order the board of supervisors attempted to subscribe $75,000 under each of said acts above named, and provided for the issuing the bonds and placing them in the hands of a trustee to be delivered as the road was built, &c., and again extended the time to complete said railroad. This order states in general terms that $75,000 is subscribed under each of said acts.

There is no evidence showing nor is it claimed that up to

December 13, 1876, any subscription by the county had been made on the books of the railroad company, or that the railroad company had in any way accepted the subscription or the terms and conditions thereof.

On 12th November, 1877, said board of supervisors made another order reciting said order of December 13, 1876, and amending the same so as to show a subscription by the county of $100,000 to said railroad company under said act of February 22, 1861, and $50,000 under said act of November 6, 1849, to be paid in bonds of the county at par, bonds to be due in 20 years after date thereof and payable at option of county after five years, to be of the denomination of not less than $1,000 each, and to bear eight per cent. interest per annum; orders clerk and chairman of board to execute 100 bonds for $1,000 each under said act of February 22, 1861, and 50 bonds for $1,000 each under said act of November 6, 1849, to be placed in hands of trustee and to be delivered to said railroad company on same conditions and limitations as required in said order of December 13, 1876.

The foregoing are all the orders and resolutions or proceedings of the county court or board of supervisors of said county subscribing stock to said railroad company, or relative thereto, at any time prior to November 12, 1877. Several other orders and resolutions were afterwards made by the board of supervisors of said county, extending the time to complete said railroad, &c.

The evidence also shows that the appellant was, at the time of the commencement of this suit, a *bona fide* holder of said bonds purporting to be issued under said act of November 6, 1849, having purchased the same for value without notice of any defense upon the part of the county.

The evidence also shows that said railroad was not commenced in said county prior to January, A. D. 1877, and that said railroad was not completed through said county until about the 1st of November, A. D. 1879.

BRIEF FOR APPELLEE.

First.

The bonds owned by appellant (purporting to be issued under said act of November 6, 1849) having been issued on November 13, 1877, and since the present constitution of the State of Illinois was adopted (July 2, 1870), the burden, therefore, is on the appellant to show that they are within the saving clause of the section of said constitution forbidding municipal subscriptions to the capital stock of railroads, &c.; and said bonds are void, because they were not issued according to the terms and conditions on which they were voted, &c. Said bonds having been issued since the adoption of the present constitution of the State, they are *prima facie invalid.* (Printed Record, pages 133–'4.)

Jackson County *vs.* Brush *et al.*, 77th Ill., 59.
Wright *vs.* Bishop, 88th Ill., 302.
Middleport *vs.* E. L. Ins. Co. *et al.*, 82d Ill., 563.
People *ex rel. vs.* Jackson County, 92d Ill, 451–'2.
People *vs.* Town of Waynesville, 88th Ill., 469.
McClure *vs.* Township of Oxford, 4th Otto, 432.
Town of Prairie *et al. vs.* Lloyd *et al.*, 97th Ill., 179.
Buchanan *vs.* Litchfield, 12th Otto, 272.
Williams *vs.* Town of Roberts, 88th Ill., 20.

Second.

Said bonds, having been issued in violation of the terms and conditions on which they were voted and subscribed, are void under section 7 of the act of the General Assembly of Illinois of April 16, 1869. (Printed Record, pages 21–'2–'3 and 156–'7.)

The following is a copy of said Sec. 7 of said act:

"It shall not be lawful to register any bonds under the provisions of this act, or to receive any of the benefits or advantages to be derived from this act until after the *railroad*, in aid of the construction of which the debt was incurred,

shall have been completed near to or in such county, township, city, or town, and cars shall have run thereon; and none of the benefits, advantages, or provisions of this act shall apply to any debt unless the subscription or donations creating such debt was first submitted to an election of the legal voters of said county, township, city, or town under the provisions of the laws of this State, and a majority of the legal voters living in said county, township, city, or town were in favor of such aid, subscription, or donation; and any county, township, city, or town shall have the right, upon making any subscription or donation to any railroad company, to prescribe the conditions upon which such bonds, subscriptions, or donations shall be made, and such bonds, subscriptions, or donations shall not be valid and binding until such conditions precedent shall have been complied with; and the presiding judge of the county court, or the supervisor of the township, or the chief executive officer of the city or town that shall have issued bonds to any railway or railways, immediately upon the completion of the same near to, into, or through such county, township, city, or town as may have been agreed upon, and the running of the cars thereon, shall certify under oath that all the preliminary conditions in this act required to be done to authorize the registration of such bonds and to entitle them to the benefits of this act have been complied with, and transmit the same to the State auditor, with a statement of the date, amount, number, maturity, and rate of interest of such bonds, and to what company and under what law issued; and thereupon the said bonds shall be subject to registration by the State auditor, as hereinbefore provided." (See Public Laws of Illinois of 1869, pages 319–20.)

Said section 7 has been judicially construed by the supreme court of Illinois in the case of Town of Eagle *vs.* Kohn *et al.*, 84th Ill., page 292.

Third.

The county is not estopped from denying its authority to issue said bonds.

Chisholm *vs.* City of Montgomery, 2d Woods, 594–5.
The Floyd Acceptances, 7th Wall., 666.

Miller *et al. vs.* Goodwin, 70th Ill., 659 and authorities there cited.

Township of Elmwood *vs.* Marcy, 2nd Otto., 289.

Marsh *vs.* Fulton County, 10th Wallace, 676, and authorities there cited.

Taylor *vs.* Dist. Township of Wayne, 25th Iowa, 447.

Herman's Law of Estoppel, sec. 224.

Fourth.

Said act of November 6, 1849, under which the bonds in the case at bar were issued, was repealed by act of March 31, 1874, which went into force July 1, 1874, and said repealing act having been in force for more than three years before said bonds were issued (November 13, 1877), and said railroad company having had no vested rights to said bonds at the time said repealing act went into force, July 1, 1874, said repealing act withdrew from the country all power to issue said bonds, and said bonds are void, because they were issued without any warrant of law. (Printed Record, pages 22–3 and 156–7.) The act repealing said act of November 6, 1859, is a part of chapter 131 of the Revised Statutes of Illinois of 1874, and is on page 1017 of said statute.

The saving clause of said repealing act of March 31, 1874, is section 2 of chapter 131, on page 1046 of Revised Statutes of Illinois of 1874, and is in the words and figures following, to wit:

6. RIGHTS SAVED.' § 2. "The repeal of the acts and parts of acts mentioned in the preceding section shall not affect suits pending or rights existing at the time this act takes effect, and as to all corporations, municipal or private, heretofore formed under any act of incorporation mentioned in the preceding section, such act of incorporation and all amendments thereof shall continue in force to the same extent and with like effect as if the same had not been repealed by this act, nor shall such repeal as above mentioned be taken, construed, or held to avoid or impair any grant made

or right acquired or cause of action now existing under any such acts or the amendments thereto, but as to all grants made or rights acquired or causes of action now existing said laws shall be continued in full force and effect. And all deeds or other instruments of writing affecting real estate which have been proved or acknowledged according to any law in force at the time such proof or acknowledgment was made may be recorded, and the same or a certified copy of the record thereof be read in evidence, notwithstanding the repeal of such laws by this or any other act of this or the twenty-seventh General Assembly.

"And when any limitation law has been revised by this or the twenty-seventh General Assembly, and the former limitation law repealed, such repeal shall not be construed so as to stop the running of any statute, but the time shall be construed as if such repeal had not been made."

As to the effect of the repeal of said act of November 6, 1849, we refer to the following authorities:

Van Inmegan *vs.* City of Chicago, 61st Ill., 31.

Illinois and Mich. Canal *vs.* Chicago, 14th Ill., 334.

Richardson *et al. vs.* Akin., 87th Ill., 138.

Middleport *vs.* Ætna Life Ins. Co., 82d Ill., 568.

Newkirk *vs.* Chapron, 17th Ill., 344.

Aspinwall *vs.* County of Davis, 22d Howard, 364.

Town of Concord *vs.* Portsmouth Sav. Bank, 2 Otto, 630.

Dwarris on Statutes, 676.

Kay *vs.* Goodwin, 6th Bing., 581.

State *vs.* Saline County, 45th Mo., 242.

McQuilkin *vs.* Doe, 8th Black, 195.

Dillon on the Law of Municipal Bonds, pages 40–1 and 50.

Dillon on Municipal Corporations, vol. 1, page 513, sec. 419.

ARGUMENT FOR APPELLEE.

First.

The present constitution of Illinois allows subscriptions by counties to railroads only when the same were authorized under existing law by a vote of the people previous to the adoption of said constitution (July 2, 1870,) and in the case at bar the time fixed by the terms and conditions of the vote, and the order of the county court attempting to subscribe the stock having expired about five years before the railroad was commenced in the county, said constitution took away from said county all power to issue said bonds.

We insist that the changes in the terms and conditions on which the voters voted, and said county court ordered the bonds to be issued, take all these bonds out of the saving clause of said constitution.

The people of the county by their votes never authorized a subscription to said railroad company and issuing bonds in payment of the same on condition that said railroad should be completed after November 13, 1877.

But the utmost limit allowed by the vote of the people and the order of said county court of November 6, 1849, for the completion of said railroad through said county was the first day of June, A. D 1872.

After the adoption of the constitution, July 2, 1870, there was no power to extend time for the completion of said railroad, nor to change the terms or conditions aforesaid, and every act attempting to do so is absolutely void.

In the case of Middleport *vs.* Ætna Life Insurance Company, 82d Ill., 568, *supra*, the court say:

"The obligations entered into under existing laws cannot, since the adoption of the new constitution, be enlarged or materially changed, either by the action of the people of the county or its corporate authorities.

"All power is taken away, and the utmost that can be

done is to make and complete the subscriptions previously voted under existing laws upon the same terms and conditions voted.

"Subscriptions or donations upon other terms would obviously require new consent on the part of the municipality, which cannot now be had for want of power."

The same rule is also announced in People *vs.* Town of Waynesville, 88th Ill., 469; People *vs.* Jackson County, 92d Ill., 45–2; Wright *vs.* Bishop, 88th Ill., 302.

The orders of said county court in attempting to subscribe stock provided that the bonds were never to be issued until the conditions were complied with.

Now, it cannot be argued that the bonds in the case at bar were issued according to the terms and conditions existing between the county and the railroad company at the time of the adoption of the present constitution, July 2, 1870. The power to change these terms and conditions having been taken away by the adoption of the present constitution, as we have heretofore shown by the repeated decisions of the supreme court of Illinois, then certainly the power to waive them was taken away by the same instrument.

Can it be argued that the county had no power to change them, but had power to waive any or all of them?

This seems to us involving a contradiction, which cannot be reconciled with logic.

Can we waive a right where we have none?

Can we waive a thing which we have no power to give or grant, in direct terms, by deed, writing, or word? Have we any power to do a thing which is prohibited by the constitution of the State?

The right and power to change, modify, or alter these terms and conditions having been taken away on July 2, 1870, by the adoption of the present constitution of the State, from the jurisdiction and control of the county authorities, therefore they could not be waived by them, as they did not belong to them.

Hence the doctrine of waivers as found in cases of this kind, but where the county had power to waive can have no application to this case.

As heretofore stated, the bonds were to be due in twenty years from their date, but these bonds are payable, at the option of the county, at any time within five years after their date; and, if these bonds are held valid, the county authorities can cause the whole amount to be paid by one levy, and thereby greatly increase the burden of taxation.

These bonds wear the badge of constitutional condemnation. Every intendment and presumption of law is against them, and the holders of these bonds must meet and avoid a prohibition of the constitution against them which in general terms denies all power on the part of the county to make and issue these bonds, with a saving proviso that if authorized under existing laws by a vote of the people of the county prior to the adoption of the constitution they are valid. Now, can this inflexible prerequisite of the constitution be met and satisfied by the same measure of evidence only that would have been sufficient on the part of holders of the bonds before its adoption? Can these essential facts, which save the bonds from the general prohibition of the constitution, be assumed or admitted until there is full proof that they *do actually exist?* Is not the *existence of the facts* which the constitution requires, and not mere acts of the county officer, which prior to its adoption might have estopped the county from inquiring into the facts? Does this proviso add nothing to the importance of the saving facts therein mentioned, nor affect the character of the evidence and certainty by which they shall be established? Hence we claim that the recitals in the orders made by the county officers and in the bonds of the result, &c., of the election of September 11, 1869, are not sufficient, but that the bondholders should show by proper evidence that all the requisitions of the law in relation to special elections then in force were complied with.

These bonds should have recited that they are issued in accordance with the saving proviso of the constitution.

Buchanan *vs.* Litchfield, *supra*, 72.

But it is claimed by the holders of these bonds that they were not required to know what these terms and conditions were; that they had a right to rely on the recitals in the bonds. This, we concede, is the law as to this class of bonds issued prior to the present constitution of the State, and under a law conferring upon municipalities power to issue them on certain conditions therein named, and which recite on their face that those conditions have been complied with.

But these bonds, having been issued since the adoption of the present constitution of the State, have no presumptions or intendments in their favor; they labor under the disabilities of a constitutional denunciation against them, and, like other dishonored paper put upon the market, the public is put upon due inquiry into everything connected with their issuance, validity, and history.

In the leading case of The People *vs.* Jackson County, 92d Ill., 452, *supra*, the supreme court of Illinois, by Justice Walker, say:

"This prohibition of the constitution is general and positive in *all cases* except those saved by the proviso, and it is a well-recognized rule that a party claiming a right saved by a proviso in a statute *must show* that the right so claimed is *clearly within the proviso, and until this is done the presumption is that it is embraced within the enacting clause.*"

In passing upon the validity of municipal bonds issued by a municipality to a railroad company after the adoption of the present constitution of the State, the supreme court of Illinois, in case of Town of Prairie *et al. vs.* Lloyd *et al.*, 97th Ill., 179 *supra*, say:

"The bonds in question having been issued after the present constitution went into effect, the burden of showing they were issued in compliance with a vote of the people of the

town had prior to the adoption of the present constitution in pursuance of some law then providing therefor rests upon those affirming their validity."

And in the same case the court also say:

"The bonds *prima facia are invalid; hence without such proof the tax in question would clearly appear to have been levied without authority of law, and should therefore be enjoined.*"

There is not one word of evidence in the record in the case at bar which even tends to show that said bonds were issued in compliance with a vote of the people of said county under any law authorizing their issue, and no attempt has been made to show that they were so issued, nor is it claimed by appellant that there is any proof which tends in any way to show they were issued in compliance with a vote of the people of said county under any law authorizing their issue. We submit that the decision of the supreme court in Town of Prairie *et al. vs.* Lloyd *et al., supra,* being a judicial construction of the constitution of the State by the supreme court of the State is decisive of the questions in the case at bar, and shows conclusively that each of said bonds are void.

Does not the date and time of maturity of these bonds raise on their face a suspicion against them, and put every prudent man upon inquiry, and from an inspection of the proposition voted on by the people and the order of said county court attempting to subscribe stock on November 6, 1869, both of which are spread of record? No one could fail to see that these bonds were issued in violation of both, and that they were *not* issued in compliance with a vote of the people, but in violation of the vote of the people, and therefore contrary to law and prohibited by the present constitution of the State.

All those who deal in these bonds are chargeable with notice of what these records contain.

Williams *vs.* Town of Roberts, 88th Ill., 20.
McClure *vs.* Township of Oxford, 4th Otto, U. S., 432.
Buchanan *vs.* Litchfield, *supra.*

Second.

The 7th section of April 16, 1869, *supra*, provides that any county, &c., shall have the right, upon making any subscription to any railroad company, to prescribe the conditions upon which bonds, &c., shall be issued; and such bonds, &c., shall not be valid or binding until such conditions precedent shall have been complied with.

In the case at bar the record shows the conditions imposed by the vote and order to subscribe, one of which was, as heretofore stated, that said railroad should be commenced in said county within nine months from the date of said election, September 11, 1869, and completed through said county by June 1st, 1872.

The evidence in the case at bar, as heretofore stated, shows clearly this railroad was not commenced in said county prior to January, 1877, nor completed through said county until about 1st of November, 1879. The evidence in the case at bar, as heretofere stated, shows that the bonds in the suit at bar were not issued until November 13, 1877.

Now, as no change was made in the terms and conditions of the vote or the order attempting to subscribe stock prior to the adoption of the present constitution of the State; and as the adoption of that instrument withdrew all power to make any change in said terms and conditions; and as there was no power to make the subscription or issue the bonds, except upon the terms and conditions voted, as we have heretofore shown, by repeated decisions of the supreme court of Illinois (Middleport *vs.* Ætna Life Ins. Co., 82d Ill., *supra;* People *vs.* Jackson County, *supra;* People *vs.* Town of Waynesville, *supra;* and as the evidence in the case at bar shows that no attempt was made to change said terms and conditions until after the present constitution was adopted, July 2, 1870; and as it is now impossible for the railroad company to comply with the terms and conditions on which the stock was voted, how can it be argued that any of said bonds are valid?

The meaning of section 7, act of April 16, 1860, *supra*, is plain. It was intended to protect the tax-payers against payment of bonds or interest thereon issued to railroads where the conditions had not been complied with.

Prior to this act the law had been settled that, in the absence of legislation to the contrary, bonds purporting on their face to have been issued by the authorities of counties and other municipalities, in pursuance of law, operated in the hands of a *bona fide* purchaser to estop the municipality from denying their validity. If, therefore, the statute above quoted is to have the force and effect evidently intended by the Legislature, the bonds in the suit at bar must be held void. To hold otherwise would be to nullify this statute, which was passed for the very purpose of providing safeguards to municipalities in cases like this.

We insist that this position is not in conflict with the rule announced in Knox County *vs.* Aspinwall, 21st How., 539. In that case the court say the bond upon its face imported a compliance with the law under which it was issued, and the purchaser was not bound to look further for a compliance with a condition to the grant of power. In that case the county of Knox, by its commissioners, had been authorized by an act of the Legislature of Indiana to make a subscription to the capital stock of the O. & M. R. R. Co., provided a majority of the qualified voters of said county at an annual election should vote for the same. A vote was had, and the subscription made, and bonds issued in payment of the same.

Suit was brought by Aspinwall on interest coupons, which had been attached to the bonds. A defence to the suit was sought to be made on the ground that sufficient notice of the election had not been given as the law required. The court held that the question was one that the law left with the commissioners to determine before making the subscription and issuing the bonds, and that, having acted under the authority conferred by law, it was to be presumed that

the precedent conditions had been performed and that such a defence as an insufficient notice could not be set up by the defendant in a suit by an innocent holder of coupons, and it was upon this question that this court announced the rule above quoted.

Does the case at bar come within this rule? What conditions precedent did this court regard as conferring authority to make subscriptions and issue bonds? Were not the giving proper notice of a vote and a vote at a regular annual election and a majority of the legal voters at such election for subscription the *precedent step* to be taken before the commissioners were empowered to make the subscription and issue the bonds. And when the bonds were issued and passed into the hands of innocent purchasers for value the holder would be protected, and that no irregularity in giving the notice, or in the vote, or in any other *act* necessary to give the commissioners power could be set up as a defence to their payment.

But does the rule announced in Knox county *vs.* Aspinwall, *supra*, affect the other conditions, aside from the petition, the notice of the election, and the vote. We think not.

We claim that it is competent for the Legislature of a State to authorize municipalities to impose such conditions as they may deem proper with respect to subscriptions to railroad companies and issuing bonds to them. It may provide that such bonds shall not be negotiable at all. If so, why may it not also provide that the bonds issued to railroad companies shall not be valid or binding until the conditions on which the stock had been voted and subscribed had been complied with by the railroad company.

Said section 7 of said act of April 16, 1869, *supra*, is a public law, which was in force more than eight years before any of the bonds in the case at bar were issued, and in force more than five months before said vote of September 18, and the purchasers of said bonds were chargeable with notice of all its provisions, and said purchasers, by examining the

records of the county, could easily have learned the conditions on which the stock had been voted and subscribed had not been complied with by the railroad company.

Every man is chargeable with notice of that which the law requires him to know, and of that which, after being put upon due inquiry, he might have ascertained by the exercise of reasonable dilligence.

The authorities are uniform that a purchaser must take notice of the law.

The supreme court of Illinois construed section 7th of act of April 16, 1869, *supra*, in case of Town of Eagle *vs.* Kohn *et al.*, 84th Ill., 292, *supra*.

In that case suit was brought by Kohn *et al.* against the town of Eagle on interest coupons which had been attached to bonds issued by said town to P., K. & P. R. R. Co. In the vote for subscription conditions were imposed.

To this suit pleas were interposed denying that the railroad company had kept and performed these conditions upon which the subscription had been voted, &c.

The supreme court of Illinois in that case, after stating the *conditions were not prerequisite to making the subscriptions or issuing the bonds*, BUT THAT THE SUBSCRIPTIONS and BONDS WERE SUBJECT TO THE CONDITIONS, *say:* "The *question, then, we conceive, depends upon the provisions of the statute of April* 16, 1869, *giving the right to prescribe conditions upon which such bonds or subscriptions should be made, and declaring that such bonds or subscriptions shall not be valid and binding until* such *conditions precedent shall have been complied with. What scope is to be given thereto, whether it is to be confined in its operation to the railroad company to which the bonds shall issue or extend to innocent holders for value.*" "*The words of the statute, by their natural force, apply to bonds under all circumstances and into whatever hands they may be.*" "Courts are wont to allow *such peremptory language of a statute full force and effect, and when a statute expressly declares that a negotiable security given under certain circumstances shall be void, to hold them void even in the hands of a bona fide indorser.*"

There is no recital in any of the bonds in the case at bar that the conditions on which they were voted or subscribed have been complied with.

The same section (7) *which provides for the registry of the bonds declares that such bonds shall not be valid and binding until such conditions precedent shall have been complied with.*

By examination of said section (7) it will be seen that the officer who makes the certificate which entitles the bonds to registration by the auditor *is not required to state one word in the certificate about the terms and conditions of the subscription.* All that is required to be stated in said certificate is "*that all the preliminary conditions in this act required to be done to* AUTHORIZE THE REGISTRATION OF SUCH BONDS AND TO ENTITLE THEM TO THE BENEFITS OF THIS ACT HAVE BEEN COMPLIED WITH."

The registration of the bonds by the auditor has nothing to do with the terms and conditions on which the stock was voted and subscribed—absolutely nothing. As before stated, said Sec. 7, *supra*, was a public law and in force before there was any election to take stock in this railroad company, and it had been in force years before these bonds were issued, and said section had been construed by the supreme court of Illinois before any of these bonds were issued; and, as the record shows that there were conditions imposed in the vote, &c., and also shows that said conditions were not performed by said railroad company to hold said bonds valid, would it not be in direct conflict with Sec. 7 of act of April 16, 1869, *supra*, and the decision of the Supreme Court of Illinois under it, in case of Town of Eagle *vs.* Kohn *et al.*, *supra?*

The recitals in these bonds may be strictly true, but there is no recital in any of them which precludes an inquiry into the performance of the conditions in the vote and the order to subscribe stock for the reason that there is no recital in any of said bonds showing that said terms and conditions have been complied with. The conditions of the vote and

order of the county court subscribing stock to the railroad company not having been complied with, neither the bonds nor subscription, according to the *express* language of said section 7, act of April 16, 1869, *supra*, are valid and binding, but are absolutely void in the hands of an innocent purchaser for value under the rule announced by the supreme court of Illinois in case of Town of Eagle *vs.* Kohn *et al.*, *supra*. It is presumed that the Legislature at the time of passing said act of April 16th, 1869, *supra*, (of which said Sec. 7 is a part), knew the law and the decisions of this court relative to bonds issued by municipalities to railroad companies, which was that bonds purporting on their face to have been issued by the authorities of a municipality, in pursuance of law, operated in the hands of a *bona fide* purchaser to estop the municipality from denying their validity.

Now, does this positive statute add nothing to the law relative to municipal bonds? Is the validity of such bonds to be determined by the same rules of law which were in force prior to the passage of said statute? Is said statute to be inoperative? Does it add nothing to the rules of law to be observed by courts in passing upon the validity of bonds issued by municipalities in Illinois to railroad companies since the passage of said act?

Third.

The county is not estopped from denying its authority to issue said bonds.

In Chisholm *vs.* City of Montgomery (2d Woods, 594–5, *supra*) Justice Bradley said:

"Officers cannot acquire authority by declaring they have it. They cannot thus shut the mouth of the public whom they represent. The body-politic cannot thus be silenced by the acts or declarations of its agents. If it could be, unbounded scope would be given to frauds of public officers."

And in the same case he also said:

"I hold it to be a sound proposition that no municipal or

political body can be estopped by the acts or declarations of its officers from denying their authority to bind it." (The Floyd Acceptance, 7th Wall., 666.)

The supreme court of Illinois, in Miller *et al. vs.* Goodwin (70th Ill., 659, *supra*), say:

"This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. Their duties and powers are prescribed by statute, which all persons not only may know, but are bound to know."

The bonds were not ratified by the acts of the county authorities, such as appointing agents to participate in the corporate meetings of the railroad company, nor by the payment of interest. No ratification can be made unless it is authorized by the people. (Marsh *vs.* Fulton County, 10th Wallace, 176, *supra*, and authorities there cited.) The bonds could not be ratified by the acts of the board of supervisors. Nothing less than the action of the electors in their corporate capacity would amount to a ratification. (Taylor *vs.* Dist. Township of Wayne, 25 Iowa, *supra*.)

Herman's Law of Estoppel, Sec. 224, *supra*.

If the bonds were void the county authorities had no power to breathe into them the breath of legality and life and make them a valid and binding debt against the county. Invalid contracts are no estoppel. (Herman's Law of Estoppel, *supra*.

Fourth.

The bonds in the case at bar show on their face by recitals, that they were issued under said act of November 6, 1849. This act was repealed by act of March 31, 1874, and said repealing act went into force July 1, 1874, and the railroad company having wholly failed to commence the railroad in said county within nine months from the date of said election, September 11, 1869, or to complete it through said

county by June 1, 1872, as required by the proposition voted on at said election, September 11, 1869, and by the order made by the said county court November 6, 1869, and said railroad company having failed to accept said subscription or place it on its books, and as there was no attempt by the county to change the terms and conditions of said vote and the terms and conditions in said order of November 6, 1869, until the 6th of February, 1871, and as no change in the terms and conditions could be made after the adoption of the present constitution of the State, July 2d, 1870, as we have heretofore shown (Middleport *vs.* Ætna Life Insurance Company, *supra*) we claim that at the time of the repeal of said act of November 6, 1849, said railroad company had no vested rights in said supposed subscription, and that at that time there was no contract existing between said county and said railroad company which could have been enforced.

There is no evidence in the record which even tends to show that the railroad was commenced in said county within nine months from the date of said election, September 11, 1869, nor completed through the county by June 1, 1872, nor is it claimed that there is any evidence tending to prove the same, and as the evidence in the record *shows clearly that said railroad was not commenced in said county prior to the year* 1877, *and that it was not completed through said county until the year* 1879, and as the bonds in this case were not issued until November 13, 1877, and as there is no evidence showing that there had been any subscription of this stock on the books of said railroad company prior to the repeal of said act of November 6, 1849, nor that said railroad ever accepted or signified an intention to accept this subscription or the terms and conditions thereof, nor that said railroad company had done any work or expended any money or entered into any contract on account of said supposed subscription by said county at any time prior to the repeal of said act of November 6, 1849, we insist that said rail-

road company at the time of the repeal of said act had no vested rights relative to this subscription, and that the repeal of said act of November 6, 1849, withdrew from the county all power to issue bonds under said act of November 6th, 1849.

At the time of the repeal of said act no bonds had been issued, nor is it claimed that the said railroad company had in any way accepted the subscription, or had in any way accepted the terms and conditions of the same, or had in any way given any notice of the acceptance of the same, or any intention to accept the same, or had done any work, expended any money, made any contract, entered into any obligation, or in any way incurred any liability on the faith of said subscription.

How, then, can it be argued that at the time of the repeal of said act of November 6, 1849, there was any contract between said county and said railroad company to be impaired, or any rights then vested in said railroad company?

It is a well-settled rule of law that, where a statute gives a right in its nature not vested, but remaining executory if it does not become executed before a repeal of the law giving the right, the right is at once obliterated by the law which repeals it. It is also a well-settled rule of law that courts must look to the act repealing rather than to the repealed act "to fix upon the powers and duties which remain in existence." (Newkirk *vs.* Chapron, 17th Ill., 344, *supra.*) Now, by examination of the saving clause of said repealing act, *supra*, and every other part of said repealing act, it will be seen there is not one word in said repealing act authorizing the issue of said bonds, and there is nothing in any part of said repealing act relative to said bonds or subscription—absolutely nothing. Neither the word "bond" or "subscription," or any reference thereto, is to be found in any part of said repealing act.

In Van Ingwegan *vs.* City of Chicago, 61st Ill., 31, *supra*, the court say:

"Inchoate rights derived under a statute are lost by its repeal unless saved by express words in the repealing statute, *and unless these rights have become so far perfected as to stand independent of the statute.*

"The effect of a repealing statute is to obliterate the prior law as completely from the records as if it had never passed, and it must be considered as a law that never existed except for the purpose of those actions or suits which were commenced, prosecuted, and concluded while it was existing law.

"Where a statute gives a right in its nature not vested, but remaining executory if it does not become executed before a repeal of the law giving the right, the right falls with the law, and it cannot thereafter be enforced."

We deny that said railroad company at the time of the repeal of said act of November 6, 1849, had any rights whatever to said bonds, but if it had any they were only incomplete or inchoate rights, and as there are no express words in said repealing act saving any rights in any way to said railroad company, it cannot be argued that said railroad company at the time of said repeal had any rights which were vested or executed, or even inchoate rights. Hence the repealing act withdrew from the county all power to issue any of said bonds.

In Richardson *et al. vs.* Akin, 87th Ill., 138, *supra,* the court say:

"A right cannot be considered as vested unless it is something more than a mere *expectation, and has already become a title, legal or equitable, to the present or future enforcement of a demand or legal exemption from another.*"

We insist that said railroad company did not at the time of the repeal of said act of November 6, 1849, nor at any time subsequent or prior thereto have any such rights as are defined as vested rights in Richardson *et al. vs.* Akin, *supra.*

The repealing act having withdrew from the county all

power to issue said bonds by repealing said act of November 6, 1849, and as there was no authority in said repealing act which authorized the county in any way to issue said bonds, how can it be argued that there was any law which authorized the county to issue said bonds. There being no law authorizing the issue of said bonds the Board of Supervisors could not breathe into them the breath of legality and make them valid and binding against the county.

If said railroad company had at any time after the repeal of said act of November 6, 1849, even after the railroad was built through the county, sought by mandamus to compel the issue or delivery of the bonds it is evident the railroad company would have had no standing in court.

The bonds in the case at bar show on their face by recitals that they were issued under said act of November 6, 1849, and as that act was repealed years before any of said bonds were issued and all power to issue them was taken away by the repealing act, said bonds are void, even in the hands of a *bona fide* holder, for value without notice.

In delivering the unanimous opinion of the Supreme Court of the United States in McClure *vs.* Township of Oxford, 4th Otto, 429, Chief Justice Waite said: "Every dealer in municipal bonds which upon their face refer to the statute under which they were issued is bound to take notice of the statute under which they were issued and of all its requirements."

The authorities are uniform that a purchaser must take notice of the law. It is an irrebuttable presumption that every person knows the law. Can it be argued that at the time of the repeal of said act of November 6, 1849, the rights of said railroad company to said bonds and subscription *had become so far perfected as to stand independent of said act of November* 6, 1849?

Judge Dillon in his able work on the law of municipal bonds, page 50, *supra*, says: "The purchaser is bound to see that there exists legislative authority not in conflict with the

State constitution for the issue of the bonds, * * * and is bound to notice the contents and recitals contained in the instruments."

All persons dealing in these bonds were bound at their peril to see that the acts of the county officers in issuing them were within the power conferred by said act. Dillon on Municipal Corporations, vol. 1, page 513, Sec. 419, *supra*.

As the county could only exercise such powers as the law conferred, and as said act of November 6, 1849, had been repealed years before these bonds were issued, and as the repealing act withdrew from the county all power to issue said bonds under said act of November 6, 1849, the issuing of said bonds under said act was not the act of the county. It is a false assumption to say that the county put these bonds on the market.

If the acts of any class of officers should be valid only when done in conformity with law it is those who manage the affairs of counties in creating debts which not they but the property owners must pay. If one of two innocent persons must suffer on account of the unauthorized acts of county officers it is clear that he who could before parting with his money, by reading the statute which repealed said act of November 6, 1849, have ascertained that there was no power to issue said bonds, should lose rather than the property holder who might know nothing of the matter, or, if he did, could not prevent the wrong.

It has never been held that officers of a county can by exceeding their authority, when that authority is limited by law, contract debts which the tax-payers of the county will be compelled to pay.

From every standpoint it seems to me that the bonds in the case at bar are void.

THOS. J. LAYMAN,
Attorney for Appellee.

JUN 1 1886
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1885.

No. 970.

THE GERMAN SAVINGS BANK, OF DAVENPORT, IOWA'
APPELLANT,

VS.

THE COUNTY OF FRANKLIN, IN THE STATE OF ILLINOIS,
APPELLEE.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Supplemental Argument for Appellee.

THOS. J. LAYMAN,
Attorney for Appellee.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1885.

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APPELLANT,

VS.

THE COUNTY OF FRANKLIN, IN THE STATE OF ILLINOIS,

APPELLEE.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Supplemental Argument for Appellee.

Since filing brief and printed argument for Appellee in this case the Supreme Court of Illinois, in the case of Richeson vs. The People, ex rel. Jones, have decided that the 100 bonds for $1,000 each issued by Appellee to the Belleville and Eldorado Railroad Company or bearer, under act of Feb. 22, 1861, are void. Believing that this decision has a direct bearing on the questions involved as to the validity of the bonds involved in the appeal in the case at bar, we print a copy of said opinion as a part of our supplemental argument in this case.

Said opinion is in the words and figures following, to-wit:

OPINION OF THE SUPREME COURT

of the State of Illinois at a term thereof began and held at Mt. Vernon on Tuesday, the 3d day of November, in the year of Our Lord, one thousand eight hundred and eighty-five.

Present, JOHN H. MULKEY, Chief Justice.
" ——— ——— Associate Justice.
" S. P. SHOPE, " "
" ALFRED M. CRAIG, " "
" JOHN M. SCOTT, " "
" BENJ. R. SHELDON, " "
" JOHN SCHOFIELD, " "
" J. O. CHANCE, Clerk.
" THOMAS M. GRAY, Sheriff.

RICHARD RICHESON,
No. 5. vs.
THE PEOPLE EX REL. WILLIAM R. JONES, County Collector of Franklin County. } APPEAL FROM COUNTY COURT OF FRANKLIN CO.

Opinion by Mr. Justice CRAIG.

Filed the 25th day of January, 1886.

RICHARD RICHESON,
No. 5. vs.
THE PEOPLE EX REL. WILLIAM R. JONES, County Collector of Franklin County. } APPEAL FROM COUNTY COURT OF FRANKLIN.

Opinion by CRAIG, J.

This was an application by the collector of Franklin county, at the May term, 1885, of the County Court, for judgment for

taxes against delinquent lands for the year 1884, and for back taxes for prior years.

On the day application was made for judgment, Richard Richeson appeared and filed objections in writing to the rendition of a judgment against lands owned by him, for taxes levied to pay interest on bonds issued by the county, to the Belleville & Eldorado Railroad Company, under an act approved Feb. 22, 1861, entitled an act to incorporate the Belleville & Eldorado Railroad Company. The objections were overruled and judgment rendered for the amount of taxes assessed against the lands to pay interest on one hundred bonds which had been issued by the county. To reverse the judgment of the County Court, Richeson appealed.

It appears from the evidence introduced on the hearing, that on the 24th day of July, 1869, the county court of Franklin county entered a record the following order:

"Be it ordered by the court, that by authority of an act of the General Assembly of the State of Illinois, entitled, "An act to incorporate the Belleville & Eldorado Railroad Company, approved Feb. 22, A. D. 1861, and an act of the General Assembly approved Nov. 6, A. D. 1849, authorizing counties to take stock in railroad companies, notice is hereby given that on Saturday, the 11th day of Sept. A. D. 1869, in the various precincts in the County of Franklin and State of Illinois, at the usual voting places, an election will be held upon the question whether or not the County of Franklin shall subscribe the sum of Two Hundred Thousand Dollars to the capital stock of the Belleville & Eldorado Railroad Company, payable in county bonds, at par, due in twenty years from date, with interest payable semi-annually at the rate of 8 per cent per annum, and to be of the denomination of not less than one thousand dollars each. Said bonds to be issued upon the following conditions, and not until they are complied with"

The first condition required the railroad to be located through Franklin county, in a certain specified time.

The second condition was as follows:

2. That the said railroad shall be commenced in the County of Franklin within nine months from the date of said election and completed through the county by the first day of June, A. D. 1872.

There were other conditions upon which the vote was taken, but it will not be necessary to refer to them here. On the 6th day of Nov., 1869, the County Court again convened and entered an order reciting the order of July 24, 1869, and then declared that a majority of the voters of the county, at the election held on the 11th day of Sept., did vote in favor of the proposition to subscribe $200,000 to the capital stock of said railroad company. The order then proceeds:

"It is ordered by the court that by authority of the vote at the election aforesaid, held in the County of Franklin, on the eleventh day of Sept., A. D. 1869, and by authority of an act of the General Assembly of the State of Illinois, entitled 'An act to incorporate the Belleville & Eldorado Railroad Company, approved Feb. 22, A. D. 1861, and an act of the said General Assembly, approved Nov. 6, A. D. 1849, authorizing counties to take stock in railroad companies, that the county of Franklin, in the State of Illinois, does hereby subscribe to the capital stock of the Belleville & Eldorado Railroad Company the sum of $100,000 by virtue of the said act of the General Assembly of the State of Illinois, entitled, 'An act to incorporate the Bellevive & Eldorado Railroad Company, approved Feb. 22, 1861, and the further sum of $100,000 by virtue of an act of the said General Assembly approved Nov. 6, A. D. 1849, authorizing counties to take stock in railroad companies, making a total of $200,000, hereby subscribed to the capital stock of the said Belleville & Eldorado Railroad Company; that said capital stock subscribed as oforesaid be payable in the bonds of the County of Franklin, at par; said bonds to be due in 20 years from the date thereof, and to draw interest payable semi-annually at the rate of 8 per cent per annum. Said bonds to be of the denomination of not less than one thousand dollars each. It

is further ordered and considered by the court that said bonds are to be issued upon the following conditions, and never until they are complied with, that is to say—"

Then follow all the conditions embraced in the order of submission, including condition No. 2, above.

No other action was taken by the County of Franklin in regard to the subscription until Feb. 6, 1871, when the county court, after reciting that the time for beginning the construction of the road has expired, ordered, "That the time for commencing and completing said railroad be extended and the said subscription be made on the stock books of the Belleville & Eldorado Railroad Company upon the following terms and conditions, and not until they are fully complied with, to-wit: * * * The said railroad shall be commenced in the County of Franklin on or before the 1st day of January, A. D. 1872, and completed through the county by the 1st day of January, A. D. 1874. That one hundred thousand dollars of said bonds payable on said stock shall be delivered to said company when said railroad is in running order, and the necessary cars, propelled by steam, running thereon from Du Quoin or Elodrado, to Benton, as aforesaid, and a station located at Benton, and $100,000 of said bonds to be so delivered when the said railroad is completed and in running order and the necessary rolling stock there no through said Franklin county.

Other orders were made from time to time in regard to the subscription after the last named order, but they have no especial bearing on the case. In the meantime the county adopted township organization, and on the 13th day of Dec. 1876, the board of supervisors passed a resolution by the terms of which the county subscribed $150,000 to the capital stock of the railroad company; $75,000 under the act of 1861 and $75,000 under the act of 1849. The order required bonds of the county to be issued and placed in the hands of a trustee. The order also provided that the building of the road should be commenced in 30 days and completed by Oct. 15, 1877. On the 12th day of Nov. 1877, the board of supervisors made

another order amending the last named order, so that the subscription of the county should be $100,000 under the act of 1861, and $50,000 under the act of 1849. In pursuance of these two orders last named the bonds were issued on the 13th day of Nov., 1877, one hundred of $1,000 each under act approved Feb. 22, 1861, and fifty of $1000 each, under the act of Nov. 6, 1849. It also appears from the evidence that no work was done in grading or track laying on the line of the road in Franklin county prior to January, 1877, and it was also proven on the trial that the road was not completed through the county until Nov. first 1879. It will be observed that the tax for which judgment was rendered, was levied for the purpose of paying interest on the one hundred bonds which purport on their face to have been issued under an act, entitled, "An act to incoporate the Belleville & Eldorado Railroad Company, approved Feb. 22, 1861."

And when bonds are mentioned hereafter in the opinion, those are the bonds referred to, as the other bonds issued under the act of 1849 are not involved, and their validity will not be considered.

As is well known, prior to the adoption of the Constitution of 1870, the Legislature had the power to authorize counties and other municipalities by a vote of the people to take stock in railroad companies and to issue bonds for such stock and levy and collect taxes in payment of such bonds: but that instrument prohibited counties, cities, towns, townships or other municipalities from becoming subscribers to the capital stock of any railroad or private corporation, or making donations to or loaning credit in aid of such corporation, with this exception, "Provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same have been authorized under existing laws, by a vote of the people of such municipality prior to such adoption." Here the subscription was not made, nor were the bonds issued prior to the adoption of the foregoing provision of the Constitution. And the question presented is, whether the subscription and the bonds can be sustained under the

proviso cited above. As before observed, the people of Franklin county did on the 11th day of Sept., 1869, vote in favor of subscribing $100,000 stock in the Belleville & Eldorado Railroad Company, but the authority which the people conferred by the vote upon the county court was upon certain conditions. Those conditions the people had the right to impose, and the county authorities could exercise the powers conferred according to these conditions, but in no other manner.

When the Constitution was adopted, the County of Franklin had the right under the vote which had been taken, to become a stock holder in the railraod company in the sum of $100,000, upon the condition that the railroad should be commenced in the County of Franklin within nine months from Sept. 11, 1869, and completed through the county by the 1st day of June, 1872. This right to take stock was not destroyed or abrogated by the Constitution, but preserved by the proviso heretofore cited. But it is manifest that the county authorities could only act as authorized by the vote of the people. The vote with the conditions upon which it was given, was the charter of their authority. They possessed such power as had been conferred by that vote, but no other. The object of the people in the adoption of the Constitution was to inaugurate a new policy, one which would absolutely prohibit municipalities in the future from involving the people of such corporations in large debts incurred for the purpose of aiding in constructing railroads, but for the purpose of not disturbing rights which may have been acquired, the proviso, was adopted which continued the right to make a subscription where the same had been authorized under existing laws by a vote of the people. In other words, where a vote had been taken under a law authorizing it, and the subscription had not, for some cause, been made, the municipal authorities had the right under the proviso to proceed and carry out the will of the voters as it had been expressed at the ballot-box. But this proviso could not authorize a subscription on any other or different terms or conditions than those specified in the vote.

The ruling in Middleport vs. Ætna Life Ins. Co., 82

Ill., 562, is in point here. It is there said: "The obligations assumed under existing laws cannot, since the adoption of the Constitution, be enlarged or materially changed either by the action of the people of the township or its corporate authorities. All power is taken away, and the utmost that can be done is to make and complete the subscription or donation previously voted under the existing laws, upon the same terms and conditions, as voted Subscriptions or donation on other terms would obviously require new consent on the part of the people of the municipality, which cannot be had for want of power."

The county authorities of Franklin county did not observe the plain duty which had been imposed upon them, and make the subscription conditioned, as they had been authorized to do by the vote of the people of the county at the election held on the 11th day of Sept., 1869; but in 1872 the county court undertook by an order, entered of record, to change and vary the conditions upon which a subscription might be made and provide that the time for building the railroad through Franklin county might be extended. This the county had no authority to do. The vote of the people of the county, which alone authorized the subscription, and the issue of the bonds, as was said before, required the railroad company, as a condition upon which the county should be bound, that the railroad should be completed through the county by the first day of June, 1872. When, therefore, the time for the completion of the road expired—it not having been built through the county—the authority of the county authorities, to take stock, terminated; and yet, as late as 1877, five years after the authority to act had expired, the subscription was made and the bonds were issued, although at this time the railroad had not been built through the county.

We are fully satisfied that the action of the board of supervisors in 1877, in issuing the bonds, was unauthorized, and that the bonds were issued without authority of law. It may, however, be said that the bonds are now in the hands of innocent holders, and that the defence interposed cannot

be successfully made against them. At the time the vote was taken under which the bonds were issued, the act of April 16, 1869, was in force; the 17th section of which provides that any county shall have the right upon making any subscription or donation to a railroad company, to prescribe the conditions upon which such bonds, subscription or donation may be made; and such bonds, subscription or donation, shall not be valid and binding until such conditions, precedent shall have been complied with.

R. L. 1874, page 794. This section of the act was bebefore the court in The Town of Eagle, vs. Kahn, 81 Ill., 84* And we there held that bonds in the hands of innocent purchasers were not valid where the conditions upon which the subscription was made, have not been complied with.

The language of the statute is plain and explicit, and unless it should be arbitrarily disregarded, we perceive no grounds upon which an innocent holder can evade its provisions.

If we are corret in our conclusions, it follows that the tax levied to pay the interest on the bonds was illegal, and the county court erred in rendering judgment against appellant's lands for such tax. The judgment of the county court will therefore be reversed and the cause remanded for another trial in harmony with this opinion.

R. and R.

I, Jacob O. Chance, Clerk of the Supreme Court of the state of Illinois, do hereby certify that the foregoing is a true copy of the opinion of said Supreme Court in the above entitled cause, of record in my office.

In testimony whereof I have set my hand and affixed the seal of said Supreme Court, at Mt. Vernon,
[SEAL] this 3d day of Feb'y, in the year of our Lord one thousand eight hundred and eighty-six.

[Signed] J. O. CHANCE,
Clerk of the Supreme Court.

*NOTE.—The case referred to above, marked with a *, is the Town of Eagle vs. Kohn et al., 84th Ill., p. 292.

[NOTE.—The opinion, of which the foregoing is a copy, is filed with the record in the case at bar.]

The bonds in the case at bar were voted by the voters of said county at the same time and on precisely the same terms and conditions as the 100 bonds declared void in the foregoing opinion (see printed record, pages 156, 157, 158, 159, 160 and 161), and they were issued by said county on the same day that the bonds in the case at bar were issued. (See printed record, pages 133–4–5, showing when both series of bonds were issued.) In fact, the only material difference between the two series of bonds is that the bonds in the case at bar show on their face they were issued under act approved November 6, 1849, and the 100 bonds declared void by the Supreme Court of Illinois, in the foregoing opinion, show on their face that they were issued under act approved Feb. 22, 1861. Both of said series of bonds are payable to the Belleville and Eldorado Railroad company or bearer; and both series show on their face that they were issued under a vote of said county at an election held in said county on the 11th day of September, A. D. 1869 (see copy of both series of said bonds, on pages 133-4-5 of printed record).

The foregoing opinion is based upon the principles and constructions announced by the Supreme Court of Illinois in Middleport vs. Ætna Life Ins. Co., 82d Ill., 562, and town of Eagle vs. Kahn et al., 84th Ill., 292, both of which are referred to in said opinion, and as these constructions and principles announced in both of said cases are judicial constructions of the constitution and laws of Illinois by its Supreme Court, we submit that the principles and constructions announced by said Supreme Court in said cases are decisive of the questions in the case at bar, for, by reference to the opinion of the Supreme Court of Illinois in said cases (Middleport vs. Ætna Life Ins. Co., 82d Ill., 562, supra, and in Town of Eagle vs. Kahn et al., supra], it will be seen that both these cases were decided by the Supreme Court of Illinois, AT ITS SEPTEMBER TERM, A. D. 1876, and the bonds in the case at bar were not issued until the 13th day of November A. D. 1877. [See printed record page 133–4–5.] Hence, the rules announced by the Supreme Court of Illinois

in the two cases last named having become the settled law and rules of property of the state for more than one year prior to the time the bonds in the case at bar were issued and as the Supreme Court of Illioois have never rendered any opion which is in any way in conflict with its opinion in Middleport vs. Ætna Life Ins. Co., supra, nor Town of Eagle vs Kahn, et al., supra, nor Richeson vs the People (heretofore copied), we insist that this court should in the case at bar, accept and apply the constructions given to the constitution and laws of Illinois by its Supreme Court in the cases above named.

In support of this position, we refer to the rule announced by this court in case of John S. Anderson, Executor, etc., vs. The Township of Santa Anna, in Dewitt county, Illinois, (No 76) opinion filed Jan 4, 1886.

In that case this court, by Mr. Justice Harlan, said:

"It is the long established doctrine of this court, from which, as said recently in Green County vs. Conness, 109th U. S., 105, we are not disposed to swerve; that where the liability of a municipal corporation upon negotiable securities depends upon a local statute the rights of the parties are to be determined according to the law, as declared by the state courts at the time such securities were issued."

In Douglas vs. County of Pike, 101st U. S. 968, this court, by Chief Justice Waite, said:

"After a statute has been settled by judicial construction, the construction becomes, so far as contract rights are concerned, as much a part of the statute as the text itself."

The Supreme Court of Illinois, as we have heretofore shown (Middleport vs. Ætna Life Ins. Co., supra, Town of Eagle vs. Kahn et al., supra), having, in September, 1876, more than one year prior to the time the bonds in the case at bar were issued, construed the present constitution of the State of Illinois and the act of the General Assembly of said state, approved April 16, 1869, [Sec. 7 of which is copied in our brief on pages 7 and 8 heretofore fiiled in this

court in the case at bar,] and as the liability of the county on the bonds in the case at bar depends upon the present constitution of the said state, and said act, approved April 16, 1869, as declared by the Supreme Court of Illinois at the time said bonds were issued, we insist that the bonds in the case at bar were void in the hands of an innocent holder at the time they were issued, as shown by the decisions of the Supreme Court of Illinois, above named. The bonds in the case at bar having been issued long since the adoption of the present constitution of the State of Illinois, and as they were issued in violation of the terms and conditions on which they were voted [see printed record pages 158, 159, 160 and 161, showing terms of vote, and pages 133–4–5, showing when bonds were issued, and page 157, showing when railroad was built in the county], and as the Supreme Court of Illinois had, in the cases heretofore cited, more than one year prior to the issuing of the bonds in the case at bar, decided that bonds of this character which were issued after the adoption of the present constitution of the State, contrary to the terms and conditions on which they were voted, are absolutely void, we submit that said decisions of the Supreme Court of Illinois show clearly that the bonds in the case at bar are void. After these judicial constructions of the present constitution of the state of Illinois and of said act, approved April 16, 1869, by the Supreme Court of Illinois, these constructions having been announced more than a year prior to the issuing the bonds in the case at bar and never overruled or modified in any way, were at the time said bonds were issued, so far as contract rights are concerned, a part of said constitution and also a part of said act, approved April 16, 1869.

Douglas vs. County of Pike, supra.

The holders of said bonds were bound at their peril to know the law as it was construed by the Supreme Court of Illinois at the time the bonds in the case at bar were issued.

"Every person is bound to know the law."

THOS. J. LAYMAN,

Attorney for Appellee.

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United States Supreme Court.

Ex parte:

IN THE MATTER OF THE PETITION OF THE CHATEAUGAY ORE AND IRON COMPANY, PRAYING FOR A WRIT OF MANDAMUS.

PETITION AND MOTION FOR RULE TO SHOW CAUSE.

EDMUND WETMORE,
Counsel for Petitioner,
45 William street, New York, N. Y.

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NOS. 49 AND 51 PARK PLACE.
1888.

[193]

Supreme Court of the United States. 1

Ex parte:

IN THE MATTER

of

The petition of THE CHATEAUGAY ORE AND IRON COMPANY, praying for a writ of mandamus. 2

And now into this Honorable Court, by its counsel, Edmund Wetmore, comes The Chateaugay Ore and Iron Company, a corporation organized and existing under the laws of the State of New York, and respectfully asks leave of the Court to file a petition herewith exhibited, for a mandamus to the Honorable Nathaniel Shipman, District Judge of the United States for the District of Connecticut, sitting as a Circuit Judge in and for the Southern District of New York, and prays 3 the Court to direct a rule to be issued to the said Honorable Nathaniel Shipman, and also to Theodore A. Blake, the defendant in error in the action mentioned in the said petition, to show cause, on a day to be fixed by the Court, why a writ of mandamus should not issue as prayed for.

Dated October 8, 1888.

EDMUND WETMORE,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER

of

The petition of THE CHATEAUGAY ORE AND IRON COMPANY for a writ of mandamus.

To

The Honorable, the Supreme Court of the United States:

The petition of The Chateaugay Ore and Iron Company respectfully shows:

I.—That it is a corporation organized and existing under and by virtue of the laws of the State of New York, and having its principal place of business at Plattsburgh, in said State.

II.—And your petitioner further shows, on information and belief: that on the 3d day of June, 1887, two actions were begun against your petitioner by one Theodore A. Blake in the Circuit Court of the United States for the Southern District of New York, by service on that day of the summons and complaint in each of said actions upon the Treasurer of your petitioner in the City of New York. That each of said actions was brought to recover damages for breach of contract, and in each of them the said Theodore A. Blake appeared by Messrs. Chittenden, Townsend & Chittenden as his attorneys.

III.—That your petitioner duly appeared in each of said actions by Matthews & Smith, its attorneys, and answered the said complaints, and thereafter and on the 23d day of November, 1887, by an order of the said Circuit Court, duly entered on that day, the said two actions against your petitioner were consolidated into one.

IV.—That thereafter, and at the October Term of the 8
said Circuit Court of the United States for the Southern District of New York, and on the seventeenth day of January, 1888, the said consolidated action against your petitioner came on for trial before the Honorable Nathaniel Shipman, the District Judge of the United States for the District of Connecticut, holding Circuit Court in and for the Southern District of New York, pursuant to the appointment made and filed by the Circuit Judge under section 596 of the Revised Statutes, and a jury. That such trial was continued from 9
day to day before the said Judge and Jury until the 25th day of January, 1888, when a verdict was rendered by the said jury against your petitioner and in favor of the said Theodore A. Blake, for nine thousand five hundred and seventy-four dollars and fifty-three cents ($9,574.53) damages.

V.—That during the progress of the said trial many rulings were made by the said Judge upon questions of law arising upon such trial, to which rulings counsel for defendant, at the 10
time they were made and before the jury had retired to consider their verdict, took and alleged exceptions, which exceptions your petitioner is informed and believes were duly noted on the minutes of the presiding Judge.

VI.—That George C. Appell, the official stenographer of the said Circuit Court, or one of his employees or associates, was present during the whole of said trial, and took complete stenographic notes of all the proceedings, which notes were written out from day to 11
day as the trial progressed, and one copy delivered to counsel for said Blake, and one copy to counsel for your petitioner, the original notes being now in the possession of said stenographer, and in the said stenographic report of the said trial the said rulings of the trial Judge and the exceptions thereto taken by your petitioner, all appear.

VII.—That immediately upon the rendition of the said verdict and before the entry of any judgment

12 thereon, or any application to the Court for judgment thereon, and in the presence of the attorney and counsel for said Theodore A. Blake, counsel for your petitioner moved the Court to set aside the said verdict as against the weight of evidence, and also for a new trial upon the exceptions taken to the rulings of the Court, and also for an extension of time in which to prepare and serve a bill of exceptions and for a stay of proceedings. The said Court then and there denied the motion to set aside the verdict as against the evidence,
13 and directed that judgment be entered on the verdict, but granted your petitioner forty days' time in which to prepare and serve a bill of exceptions, and granted a stay of execution until the decision of the motion for a new trial upon the bill of exceptions, and the presiding Judge then stated that he would fix a day for hearing the motion for a new trial upon the settlement of the bill of exceptions.

VIII.—That on the 31st day of January, 1888, judgment in the said action was entered against your peti-
14 tioner and in favor of said Theodore A. Blake for nine thousand six hundred and sixty-five dollars and thirty-nine cents ($9,665.39).

IX.—That thereafter and on the 3d day of March, 1888, that being before the expiration of the forty days allowed by the Court for that purpose as aforesaid, your petitioner served upon Messrs. Chittenden, Townsend & Chittenden, they being the attorneys of record for said Theodore A. Blake, the bill of exceptions as proposed by your petitioner.
15 That said proposed bill of exceptions was accepted and retained by the said attorneys and the service thereof admitted in writing. That on the 13th day of March, 1888, said attorneys for Theodore A. Blake applied to the attorneys for your petitioner for ten days' additional time within which to prepare and serve such amendments as they wished to make to the said bill of exceptions proposed by your petitioner, which application was granted and a stipulation to that effect signed by your petitioner's attorney. That on the 23d day of

March, 1888, said attorneys for Theodore A. Blake 16
served upon the attorneys for your petitioner the amendments—seventy-seven in number—which they desired to make to the proposed bill of exceptions.

That certain of said proposed amendments were allowed by your petitioner while others were disallowed by it, and on the 27th day of March, 1888, your petitioner s attorneys served upon the said attorneys for Theodore A. Blake a notice that said proposed bill of exceptions and amendments would be presented to Judge Shipman for settlement and signature on the 17
10th day of April, 1888, at the United States Courtrooms, in the City of New York.

That said notice of settlement was received and retained without objection by the said attorneys for Theodore A. Blake, and a written admission of the service thereof given by them to your petitioner's attorneys.

That on the said 10th day of April, 1888, your petitioner appeared, by its attorneys, before Judge Shipman, and moved that its said proposed bill of exceptions 18
be settled and signed, and at the same time and place the said attorneys for Theodore A. Blake appeared and opposed the said motion upon the ground that the term of Court at which the said action was tried had theretofore expired, to wit, on the 31st day of March, and that the forty days' time allowed by the Court at the close of the trial within which to prepare and serve a bill of exceptions had also expired, and therefore the said Theodore A. Blake was out of Court and the Court no longer had jurisdiction over 19
him. The said motion was thereupon continued until the following day, April 11, when both parties again appeared before Judge Shipman, and the said Judge announced his decision sustaining the objections made by counsel for said Theodore A. Blake, and refusing to settle or sign any bill of exceptions whatever in the said cause, for the reason, as then stated orally by him, that the term of court at which the action was tried had expired, and the forty days originally allowed by

20 the Court had also expired, and no order had been made or consent given by the said Blake or his attorneys extending the time for signing a bill of exceptions beyond the term at which the said cause was tried, and that no very extraordinary circumstances were shown in the case to justify the Court in entertaining the application—so that under the rule laid down in the case of Müller *vs.* Ehlers (91 U. S., 249), decided by this Honorable Court, your petitioner's application for the settlement and signing of said
21 bill of exceptions must be denied.

That on May 18th, 1888, your petitioner applied to his Honor Judge Shipman for a reargument of its application to settle and sign its aforesaid bill of exceptions, which motion for a reargument was denied on or about June 15th, 1888.

X.—That, as your petitioner is advised, the October term of the said Circuit Court expired on the Saturday preceding the last Monday of February, 1888, to wit, the 25th day of February, and that on the said last
22 Monday of February a new term of said Court began, in accordance with the provisions of the Revised Statutes of the United States, § 658. And said section 658 of the Revised Statutes of the United States as construed by the Judges of the Circuit Court of the United States, for the Second Circuit, closes the said October Term of the Court, when the February term, as provided for by said section, begins, except so far as said October term may be extended by express adjournment for the completion of unfinished
23 business, as was stated by his Honor Judge Lacombe, upon the argument before him, of a motion made in the aforesaid action, to set aside an execution issued therein against your petitioner shortly after the refusal of his Honor Judge Shipman to settle a bill of exceptions as aforesaid.

XI.—That by the appointment or designation of Judges to hold the Circuit Court in and for the Southern District of New York for the year 1888, made by the Honorable William J. Wallace, Circuit Judge,

and filed in the office of the Clerk of said Court, on the 24
day of 1887, the Honorable Nathaniel Shipman, District Judge for the District of Connecticut was assigned to hold said Court for two weeks, beginning on the 16th day of January, 1888; that the session of the said court held by Judge Shipman terminated on Friday, the 27th day of January, 1888, and that during the period from said last-mentioned day till the first Monday of April, when the April term of said Court began, the said District Judge for the District of Connecticut was not assigned to hold any court 25
within the Southern District of New York, and as your petitioner is informed and believes the said District Judge was not at any time between the said 27th day of January, 1888, and the first Monday of April, 1888, within the Southern District of New York for any official purpose.

XII.—That among the rules of practice adopted by the Circuit Court of the United States for the Southern District of New York, and in force prior to the passage of the Act of Congress passed 1872, and 26
now forming § 914 of the Revised Statutes, were the following:

RULE 67.

Whenever it shall be intended to move to set aside a verdict, except for irregularity, a case may be prepared by the party intending the motion, and a copy thereof served on the opposite party, before judgment is rendered and entered upon such verdict, who may, within four days thereafter, propose amendments thereto, and serve a copy on the party who prepared the case, and, 27
if the parties cannot agree together in regard to such amendments, then, within four days thereafter, either party may give the other notice to appear within a convenient time and not more than four days after service of such notice, before the Judge who tried the cause, to have the case and amendments settled; and the Judge shall thereupon correct and settle the same as he shall deem to consist with the truth of the facts; but if the parties shall omit, within the several times above limited, unless the same shall be enlarged by a Judge, the one to propose amendments and the other to

notify an appearance before the Judge, they shall respectively be deemed, the former to have agreed to the case as prepared, and the latter to have agreed to the amendments as prepared; and if the party omit to make a case within the time above limited, unless the same shall be enlarged as aforesaid, he shall be deemed to have waived his right thereto.

RULE 69.

Where exceptions to the opinion of the Court are taken by either party on the trial of a cause, or there is a demurrer to evidence interposed, or a special verdict found, the party shall not be required to prepare his bill of exceptions at the trial, or his demurrer or statement of the evidence, or to put in form the special verdict, but shall merely reduce such exceptions to writing or make a minute of the demurrer to the evidence and of the facts found specially by the jury as the case may happen to be, and deliver it to the Court; or the Court will themselves, at the request of either party, note the point, and the bill of exceptions, demurrer to evidence and special verdict shall afterwards be drawn up, amended and settled within such times and under the same rules and regulations as are observed with respect to cases.

That said rules, as your petitioner is informed and believes, have not been abrogated, but are still in force, except so far as they may have been modified by the rules and practice of the Supreme Court of the State of New York, relating to bills of exceptions and the provisions of said §914 of the Revised Statutes. That the rules of practice of the Supreme Court of the State of New York applicable to actions at law in force at all times since January 1, 1888, as well as long prior thereto, provide among other things as follows:

RULE 32.

Whenever it shall be necessary to make a case, or a case and exceptions, or a case containing exceptions, the same shall be made, and a copy thereof be served on the opposite party within the following times:

If the trial was before the court or a referee (including trials by a jury of one or more specific questions of fact in an action triable by the Court), within ten days after service of a copy of the decision, or

report, and of written notice of the entry of judgment 32
thereon.

In the Surrogate's Court, within ten days after service of a copy of the decree or order and notice of the entry thereof.

If the trial were before a jury, within ten days after the trial, or within ten days after notice of the decision of a motion for a new trial, if such motion be made and be not decided at the time of trial, or within ten days after notice of the entry of judgment, under section 1185 of the Code.

The party served may, within ten days thereafter, propose amendments thereto and serve a copy on the 33
party proposing the case or exceptions, who may then, within four days thereafter, serve the opposite party with a notice that the case or exceptions, with the proposed amendments, will be submitted at a time and place to be specified in the notice, to the Justice, Surrogate or Referee before whom the cause was tried, for settlement.

Whenever amendments are proposed to a case or exceptions, the party proposing such case or exceptions shall, before submitting the same to the Justice, Surrogate or Referee for settlement, mark upon the several amendments his proposed allowance or disal- 34
lowance thereof, and shall have plainly marked thereon and also upon the stenographer's minutes the parts to which the proposed amendments are applicable, together with the number of the amendment. And if the party proposing the amendments claims that the case should be made to conform to the minutes of the stenographer, he must refer at the end of each amendment to the proper page of such minutes. The Justice, Surrogate or Referee shall thereupon correct and settle the case. The time for settling the case must be specified in the notice, and it shall not be
less than four or more than twenty days after service 35
of such notice. The lines of the case shall be so numbered that each copy shall correspond. The Surrogate, on appeals from his court, may by order allow further time for the doing of any of the acts above provided to be done on such appeals.

Cases reserved for argument, and special verdicts, shall be settled in the same manner. The parties may agree on the facts proven to be inserted in the case, instead of the testimony, on the approval of the Justice.

All requests to find facts or conclusions of law must be made in writing to the Judge or Referee before whom

36 the trial was had, at or before the time of the submission of the action for decision, and the Court or Referee shall not, after he shall have made and settled the findings and conclusions so submitted, make additional findings of fact or conclusions of law.

RULE 34.

A bill of exceptions shall only contain so much of the evidence as may be necessary to present the questions of law upon which the same were taken on the trial; and it shall be the duty of the Justice, upon
37 settlement, to strike out all the evidence and other matters which shall not have been necessarily inserted.

A case or exception shall not contain the evidence in *hæc verba*, or by question and answer, unless ordered by the Justice, Surrogate or Referee by or before whom the same shall be settled. But the facts of the case, together with the rulings on the trial, shall be stated in a narrative form, except that where it is claimed by either party that any particular testimony should be in *hæc verba*, the Justice, Surrogate or Referee who settles the case shall determine whether or not a proper presentation of the case for review requires such a
38 portion of the evidence to be so stated in *hæc verba*, in which case the case shall be made accordingly.

And in case any case or bill of exceptions does not conform to this rule the Court before which the same shall be brought for review may order the same back for resettlement, or may direct that no costs shall be taxed for the printing of so much of the case as it shall deem to have been unnecessarily inserted.

Exhibits shall not be printed at length, unless the Justice, Surrogate or Referee so direct.

XIII.—That on the 27th day of April, 1888, a writ
39 of error to review the said judgment, and also a citation to the said Theodore A. Blake, were issued out of this Court, which writ and citation have been duly served upon the said Theodore A. Blake, and the usual security required by law to make said writ operate as a *supersedeas* has been executed, approved and filed, as will more fully appear from the return made to the said writ of error by the Clerk of the Circuit Court for the Southern District of New York, on file in this Court.

XIV.—That unless a writ of mandamus shall be

granted, compelling the said District Judge of the 40
District of Connecticut to settle and sign a bill of exceptions according to the proceedings had before him on the trial of the said action, your petitioner will be without any remedy for the correction of the errors which your petitioner is advised by counsel were committed by the said Judge upon the trial as aforesaid, which errors were prejudicial to the rights of your petitioner, as it is likewise advised by its counsel; and it will be deprived of the right, to which by law it is entitled, of having the rulings made by the 41
Court upon the trial of said action touching questions of law, adverse to your petitioner, and to which exceptions were duly taken by it, reviewed, and any errors to its prejudice corrected by this Honorable Court.

Wherefore, your petitioner prays that a writ of mandamus be granted by this Honorable Court commanding the said Honorable Nathaniel Shipman, as District Judge of the District of Connecticut, assigned to hold Circuit Courts within the Southern District of New York, to settle the bill of exceptions tendered by your 42
petitioner according to the truth of the matters which took place before him on the trial of the aforesaid action, and when so settled to sign the same as of the 10th day of April, 1888, that being the day when the said bill of exceptions was submitted to him.

And your petitioner will ever pray.

THE CHATEAUGAY ORE AND IRON COMPANY,
By SMITH M. WEED,
President.

43

STATE OF NEW YORK,
Southern District of New York, } *ss.:*
City and County of New York.

Smith M. Weed, being duly sworn, says that he is President of the Chateaugay Ore and Iron Company, the petitioner above named. That he has read the foregoing petition, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on infor-

44 mation and belief, and as to those matters he believes it to be true.

SMITH M. WEED.

Sworn before me, this day of October, 1888.

JOHN A. SHIELDS,
U. S. Circuit Court Commissioner for
Southern District of New York.

STATE OF NEW YORK,
45 Southern District of New York, } ss.:
City and County of New York,

Frank E. Smith, being duly sworn, says that he is an attorney and counsellor at law, and is one of the attorneys for the Chateaugay Ore and Iron Company. That he has read the foregoing petition and knows the contents thereof, and that the same, so far as it relates to proceedings had in court upon the trial of the action therein referred to, and so far as it relates to proceedings had for the purpose of procuring the
46 allowance of a bill of exceptions in the said action is true of his own knowledge.

FRANK E. SMITH.

Sworn before me, this day of October, 1888.

JOHN A. SHIELDS,
U. S. Commissioner for
Southern District of N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1888.

Ex parte: IN THE MATTER of THE CHATEAUGAY ORE AND IRON COMPANY, Petitioner.	On petition for a writ of Mandamus.

On consideration of the petition for a writ of mandamus, herein, and on motion of Mr. Frank E. Smith, of counsel for the petitioner,

It is now here ordered by this Court that cause be shown by the Honorable Nathaniel Shipman, District Judge of the United States for the District of Connecticut, sitting as a Circuit Judge in and for the Southern District of New York, and Theodore H. Blake, before this Court on Monday, the 12th day of November, A.D, 1888, at twelve o'clock, noon, or as soon thereafter as counsel can be heard, why a writ of mandamus should not issue as prayed in said petition.

October 15, 1888.

IN THE

Supreme Court of the United States.

In the Matter

of

The Petition of the CHATEAUGAY ORE AND IRON COMPANY for a Writ of Mandamus upon HON. NATHANIEL SHIPMAN, Justice, &c., and THEODORE A. BLAKE.

Theodore A. Blake, one of the respondents, respectfully shows to this Honorable Court, by way of answer to the said petition, the following facts:

That he commenced two actions at law in the said Circuit Court against the petitioner, one to recover the balance due him on an agreement in writing for the construction of a mill for crushing iron ore, the other for machinery sold, which actions were consolidated by an order entered by consent.

The petitioner's answers admitted the construction of the mill and the delivery of the machinery, but averred that the mill had not the capacity to crush 600 tons of ore daily, guaranteed by the written agreement, and demanded $52,000, or more than double the contract price of the mill, as damages.

The length of the trial is somewhat exaggerated in the petition, and was caused by an exhaustive examination by the petitioner of the running of the mill from its completion, Sept. 26, 1887, down to the trial, during

which time it crushed and separated 122,800 tons of rock ore. The daily capacity of the mill was the question litigated. The respondent called but two witnesses. One was his agent in the construction ; he other an employee of the petitioner in running the mill.

After examining seven witnesses, and the argument to the jury, the petitioner presented eighteen written requests to the Court to charge all relating to the capacity of the mill.

About four years before the date of the contract in question, respondent had built for the petitioner another crushing mill of 200 tons daily capacity.

The Court, among other things, charged the jury that the first question for their consideration was in regard to " the set of machinery or crushing plant, which the " plaintiff warranted would have a capacity of 600 tons " of ore daily, which should be crushed to pass through " a round hole, $\frac{4}{16}$ of an inch in diameter, *and is, did* " *the machinery or mill comply with the requirements* " *of the warranty?*

" The contract was for a very large set or double set of " crushing machinery of powerful character, to be sub- " jected to heavy work and to great strain ; and speci- " fied that it should have a capacity of 600 tons daily ; " which meant that with an adequate supply of proper " ore and fairly and reasonably tended and cared for, it " should have a continuous ordinary working capacity " of receiving and crushing 600 tons of ore per day, for " a continuous period of time sufficient to subject the " machinery to an adequate test. Breakages and con- " sequent delays resulting from ordinary wear and tear, " and the natural incidents of such machinery, were not " guaranteed against. It was agreed by the guaranty " that the defects of the machinery, owing to unsuita- " ble size or non-adaptation of the parts to each other, " or defective construction or workmanship, should not

" be such as to continuously prevent its 600 ton capac-
" ity. It was not within the purview of the guaranty
" that machinery of this large and ponderous character
" should never have an interruption, or should from the
" very beginning work with perfect smoothness, but it
" was to be operated long enough and for a sufficiently
" continuous period of time to ascertain its daily ca-
" pacity under competent management, and treated and
" tended properly, and furnished with proper ore.

" The plaintiff in guaranteeing a daily capacity, is to
" be understood as contracting in view of the known
" circumstances or the circumstances which he had
" adequate reason to known were those under which the
" defendant's mine was ordinarily worked, because he
" had previously contracted with them and had an op-
" portunity of knowing the manner in which they ordi-
" narily and usually worked their mining property, and
" if the usual and customary number of hours per day
" was known to him, or he had previously adequate
" reason to know to be twenty, then the daily capa-
" city was to be during twenty working hours."

" The ore which was to be treated or crushed was the
" ordinary and usual admixture of ore as it comes from
" the mines. It was not to be exclusively fine and not ex-
" clusively coarse, but the usual and customary mixture.
" The plaintiff did not guarantee to crush 600 tons of ore
" improperly mixed or presented to the machines under
" conditions which were abnormal and destructive to
" the property."

"This being the construction of the contract was it
" fulfilled? The plaintiff takes the burden of proof."

Further instructions were given by the Court covering all the other branches of the case. The jury after a brief consideration returned a verdict for the plaintiff for the full amount claimed.

On the 25th of January, after the verdict, the peti-

tioner moved orally to set it aside as against evidence, and for a new trial upon a bill of exceptions to be thereafter drawn. The Court overruled the motion to set aside the verdict and ordered judgment thereon to be entered; and that the defendant have a stay of forty days to prepare and serve its bill of exceptions, and a further stay until the decision of such motion for a new trial upon said bill of exceptions.

No bill of exceptions was presented to the Court for allowance until April 10th, or five weeks after the expiration of the forty days, nor was any extension of the time allowed by the Court or by stipulation nor was any such extension applied for either to the Court or this respondent.

On March 3d, within two days of the expiration of the forty days, the petitioner delivered to respondents' attorney a document or 78 type written folio pages, of 27 lines each, endorsed as its "proposed bill of exceptions." Seventy-two pages of it comprised selected portions of the evidence. It proposed thirty-two exceptions, twenty arising upon the evidence, and twelve upon the charge.

As the selected extracts from the evidence were misleading, and that form of presenting the case, if permitted, required the addition of other portions, and although the forty days had expired, the term had not, and the allowance of the exceptions was still within the judicial discretion, the respondents' counsel procured from the petitioner an extension of the time to propose amendments from March 13th to March 23d, still leaving to the petitioner eight days of the term for the presentation of the exceptions to the Court and to apply for their allowance.

On March 27th petitioner's attorneys gave notice that "the proposed bill of exceptions would be presented "for settlement and signature to the Hon. Nathaniel "Shipman," on the 10th day of April or fourteen days thereafter.

On the 10th day of April, the proposed bill of exceptions was presented, and petitioner made its motion that they be then signed. No excuse whatever was made or attempted for the negligence and delay.

Counsel for respondent objected that the time allowed by the order of January 25th had long expired, that no application for its extension had been made, that the October Term of the Court had expired, and the parties were no longer in Court, that, if the Court might lawfully, in its discretion, entertain the petitioner's motion, under the statutes and rules of the Court, that no reason was shown for the exercise of that discretion.

After argument, at the request of petitioner's counsel, the hearing was postponed until the next day, when petitioner appeared with Mr. Wetmore as additional counsel, and the motion was by him argued at length. He cited the decisions of this Court supposed to be in point, including *Davis* vs. *Patrick*, 122 U. S., 138. Justice Shipman, at the close of the argument, denied the motion.

At these two hearings, no claim or suggestion of the expiration of the October Term of the Circuit, at any other time than on Saturday the 31st of March preceding the first Monday, being the second day of April, 1888, was made by petitioner's counsel, although respondent's counsel claimed that, in the absence of a prior adjournment, that term expired on the week day preceding the date fixed by statute for the commencement of the regular April Term.

On the hearing of another motion before Justice Lacombe, made sometime afterwards, a query was suggested by the Justice, whetner under Sec. 658, Rev. Stat. U. S., the February Term "for the trial of criminal causes and suits in equity" was not a regular term which ended the October Term when the February Equity and Criminal Term commenced. After this suggestion

was made the petitioner applied to Justice Shipman for a rehearing of its motion denied April 11th. After argument by written briefs, in which petitioner made the new point that the October Term ended in February and not on March 31st; the petitioner's motion for a rehearing was denied.

Respondent is advised by counsel that the statement in the twenty-second folio of the petition relating to the "closing" of the October Term of said Court is either misleading or incorrect; that, by the terms of said Section 658, as well as the general understanding of the bar, and the opinions of the Court found in the reported cases, the construction of said section adopted by the counsel for both petitioner and respondents and the Court on April 10th and 11th is the correct, lawful construction.

The respondent does not know whether Justice Shipman was not within the Southern District of New York for any official purpose between said "27th of January, 1888, and the first Monday of April, 1888," as stated in folio 25 of the petition, but he does know that at least ~~there~~ three Judges of the Federal Courts are residents of said District, and that the attorneys for the petitioner have several times applied to Justice Shipman for orders, and twice have had hearings in this case before Justice Shipman at Hartford, about three hours travel from New York, where he resides. On one of these hearings, respondent attended with his counsel.

This respondent denies that any substantial error, prejudicial to the rights of the petitioner, was committed by said Judge upon said trial, or that it will be deprived of any right, as stated in Folio 40 of said petition; on the contrary, thereof, he is advised by his counsel, and believes that many of said proposed exceptions are trivial, and none of them involve the substantial merits of the action.

This respondent humbly represents

That after a trial of the merits before a Court, of experience and authority, a jury has decided that he is entitled to compensation for his labor and goods, the use and proceeds whereof the petitioner is now enjoying ; that he has recovered a judgment therefor in conformity to law.

That by its own negligence and failure to conform to an order of the Court, made on its motion, the petitioner has waived its right to file exceptions, and further delay the payment of the respondent's claim.

That it has applied to the Court to be relieved from the consequences of its said negligence, and after hearing and rehearing, the Court has decided against its application.

That he is advised by counsel, that by the statutes and rules and practice of the Courts, no exceptions can be alleged or taken against such decision.

He therefore respectfully suggests that the prayer of said petition should be denied.

STATE AND SOUTHERN DISTRICT OF NEW YORK, *City and County of New York*, } ss. :

THEODORE A. BLAKE, one of the respondents to said petition for a writ of mandamus, being sworn, deposes that he has read the foregoing answer and knows the contents thereof; that he was present in Court, and heard what was stated at the several hearings in said answer mentioned; that the said answer is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Sworn before me, this
day of November, 1888.

MARTIN B. BROWN, Printer and Stationer, 49 and 51 Park Place.

FILED
OCT 16 1888
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

1

IN THE MATTER

of

The Petition of THE CHATEAUGAY ORE AND IRON COMPANY, praying for a Writ of Mandamus.

Brief in Support of Petition.

2

The object of this petition is to procure for the petitioner the signing and settlement of its bill of exceptions on an appeal taken to this Court.

The learned Judge, before whom the action was tried in the Court below, declined to settle and sign the bill of exceptions on the ground that it was presented after the expiration of the term at which the case was tried, without due extension by order of Court, or consent of parties.

3

The petitioner respectfully submits that this was error; that the time to present said bill of exceptions had been duly extended beyond the expiration of said term, both by order of Court, and by consent of parties, and that it was a matter of right that the same should be settled and signed at the time it was presented.

The facts set forth in the petition, material to the point at issue are, chronologically, as follows:

On the 25th day of January, 1888, verdict was rendered against the petitioner and the Judge before

4 whom the case was tried thereupon made an order granting the petitioner forty days in which to prepare and serve a bill of exceptions.

Moving Papers, pp. 3, 4, fols. 9, 12, 13.

The Court adjourned on the 27th day of January, 1888, and the term of the Court expired the 25th day of February, 1888, the Saturday preceding the commencement of the new term, and the said expiration of the term occurred within the said forty days allowed the
5 petitioner to present its bill of exceptions, and eleven days before the expiration of said forty days.

P. 6, fols. 21, 22, p. 7, fol. 24.

On the 3d day of March, 1888, four days before the expiration of said forty days, the petitioner served its bill of exceptions on plaintiff's attorney, who accepted service thereof, and, ten days thereafter, applied for and obtained from the petitioner's attorneys, by written stipulation, a consent extending their time to serve
6 amendments to the proposed bill of exceptions, ten days, to wit, to March 23, 1888.

pp. 4, 5, fols. 14, 15.

On the 23d day of March, 1888, the expiration of said ten days, plaintiff's attorneys served their proposed amendments, to some of which the petitioner's attorneys agreed and to some of which they did not, and within four days after the service of said proposed
7 amendments, to wit, on March 27, 1888, served notice on plaintiff's attorneys that they would present the said bill of exceptions for settlement and signature, fourteen days thereafter, to wit, on April 10, 1888, to his Honor Judge Shipman, who tried the case, and who was assigned to return into the Southern District, where the cause was tried for the term of Court beginning the first Monday of April, 1888, viz.: April 2, 1888.

P. 5, fols. 16, 17, p. 7, fols. 24, 25.

Plaintiff's attorneys accepted and retained said notice without objection, but on the presentation of said proposed bill for settlement and signature attended, and then and there for the first time raised the objection that it was too late to present said bill for settlement and signature, because the term at which the action had been tried had expired, which objection was sustained, and the learned Judge declined to settle or sign said bill of exceptions, as set forth in the moving papers. 8

P. 5, fols. 17, 18, 19, p. 6, fol. 20. 9

The 69th rule of practice of the Court in which the cause was tried requires that the bill of exceptions shall be " drawn up, amended and settled within such times and under the same rules and regulations as are observed with respect to cases," which last are provided for by the 67th rule, which prescribes that a case may be prepared and a copy served upon the opposite party at any time before judgment is entered upon the verdict which it is desired to be set aside; 10 amendments may be served upon the party proposing the case within four days thereafter, and, if parties cannot agree together in regard to such amendments, then, within four days thereafter, either party may give the other notice to appear " within a convenient time and not more than four days after service of such notice, before the Judge who tried the cause to have the case and amendments settled."

Petition, pp. 7 and 8.

11

The foregoing facts show the following state of affairs:

1. The specific rules of court above quoted seem to supersede for that court the general unwritten rule of practice that a bill of exceptions must be signed and filed before the expiration of the term at which judgment is rendered. If, for example, the verdict on a trial was given only three days before the expiration of the term, the bill of exceptions could not be settled

12 and signed within the times prescribed in the above-quoted rules, for proposing said case and amendments, until after the expiration of said term, and the general rules appear to be a substitute for the special extension of time, which, in the case supposed, it would otherwise be necessary to obtain by special order of Court, or consent of parties.

This is in accordance with a very general modern practice and one which has for many years prevailed
13 in the New York State Courts, whereby the proposing and settling of cases and bills of exceptions are limited to a prescribed number of days, without regard to the expiration of the term.

2. However this may be, there was, in this case, a special order of Court, made immediately upon the conclusion of the trial, permitting judgment to be entered upon the verdict, but giving the petitioner forty days time within which to prepare and serve the
14 bill of exceptions, thus extending the time for that purpose beyond the time when the judgment was entered and beyond the expiration of the term, because both events happened within the said forty days, and to give the order any other interpretation would nullify it.

It seems to have been assumed in the first instance by the learned Judge to whom the bill of exceptions was presented, that the term expired after said forty
15 days and on March 31, 1888, the day preceding the beginning of the April term, instead of February 25, 1888, the last secular day preceding the beginning of the February term, and, therefore, within said forty days; but he declined to reconsider his decision upon that ground, when it was presented to him on a motion for a rehearing.

As matter of both fact and law the petitioner respectfully contends that the term expired February 25.

The Revised Statutes provide, in respect to the 16
terms of Court for the Circuit Court for the Southern District of New York, as follows:

"SEC. 658. The regular terms of the Circuit Courts "shall be held in each year at the times and places "following: * * *

"In the Southern District of New York, at the City "of New York, on the first Monday in April and the "third Monday in October; and for the trial of criminal "causes and suits in equity, on the last Monday in Feb- 17
"ruary; and exclusively for the trial and disposal of "criminal cases and matters arising and pending in said "Court, on the second Wednesday in January, March, "and May, on the third Wednesday in June, and "on the second Wednesday in October and December; "*Provided*, That the holding of any of the last men- "tioned terms for criminal business shall not dispense "with nor affect the holding of any other term of the "court at the same time, and that the pending of any "other term of the court shall not prevent the holding 18
"of any of the said terms for criminal business."

R. S., Sec. 658, p. 121.

The general rule is that a regular term of Court continues until the beginning of the next stated term. Under the operation of this rule the October term of the Circuit Court for the Southern District of New York terminates the day before the commencement of the next or February term.

19

Freeman on Judgments, Sec. 90.

No reason has been suggested for construing the section under examination so as to create an exception to this rule, except the fact that the section limits the February term to the trial of criminal causes and suits in equity, but this is certainly no reason and no ground has, so far as counsel have heard or are aware, ever been stated why it should be considered a reason for creating such an exception. To fix a definite limit to a stated

term it is held, as a general rule of legal interpretation, to continue until the beginning of the next term, and the particular class of business which may be assigned to the successive terms can have no effect upon that rule, and is an immaterial circumstance. The rule will be followed unless a special exception shall be prescribed, and the section under consideration affords an instance of this, and presents a strong argument in favor of the interpretation here claimed. It prescribes certain terms which are exclusively for the trial and disposal of criminal cases and matters, with a proviso that the holding of said terms for criminal business shall not dispense with, nor affect the holding of any other term of the Court. The use of the proviso as to the effect of the criminal terms, shows that without the proviso the terms at which other than criminal business was done might be determined by the commencement of the said criminal terms, and as the proviso does not cover the February term which includes equity causes and also is not in the group of "last-mentioned terms" to which the proviso specifically refers, the general rule already stated makes the beginning of the February term the end of the October term.

Moreover, as matter of fact, the Circuit Court for the Southern District of New York, in accordance with the view here urged, regards and holds the October term as terminating at the beginning of the February term, and although there is no record of this fact in any filed decision, it was orally announced from the bench upon one of the proceedings in this cause, and counsel were authorized by one of the said Circuit Judges, to make a statement to that effect in urging the motion for a rehearing.

Inasmuch, therefore, as by reason of the foregoing facts the term of Court had expired before the time allowed to propose the bill of exceptions, the expiration of said term was no reason for denying the petitioner's right to have its bill of exceptions signed and settled.

The only irregularity in the proceedings of the petitioner's attorneys was in making their notice for the settlement of the case, after the failure to agree upon the proposed amendments, a *fourteen* day notice instead of a *four* day notice. They did this on the supposition that, as the case was on the law side of the Court, the practice of the New York State Courts prevailed, as to making and settling bills of exceptions, and that practice prescribes a notice of not less than four or more than twenty days for presenting them for final settlement.

If they were in error in this respect the error was waived. It was impossible to give the four days notice required by the rule because the learned Judge who tried the cause was not within the District during that period. An extension of time would in any event have been necessary. The petitioners made the notice for more than four days and for a date after the Judge who tried the cause was again assigned to duty within the district, and by keeping the notice without objection plaintiff's attorneys impliedly consented to that arrangement. They waived the four-day notice and consented to take a fourteen-day notice, as they had the right and the power to do. They should have, with reasonable promptness, returned the notice, as too late, if they made that objection. The petitioner's attorneys could then have obtained the necessary extension by order. It would sanction an act of bad faith and inflict gross injustice to permit the plaintiff's attorneys thus to mislead the petitioner's attorneys and to take advantage of that fact to throw them out of court.

It will be observed that the expiration of the term had nothing to do with this irregularity. The term had expired long before, and it should not be allowed any different effect because it happened after the expiration of the term than it would have had if it had happened before the expiration of the term. The time to propose the bill of exceptions had already been extended beyond the expiration of the term.

28 It is respectfully submitted that the learned Judge in the Court below was in error when he supposed that the rule laid down in *Müller* vs. *Ehlers* (91 U. S., 249), required him to refuse to sign and settle the petitioner's bill of exceptions, because of the expiration of the term at which the judgment was rendered. That case expressly recognizes the power to extend that time by order of Court or consent of parties, and that power had, in this instance, been exercised.

29 To grant an order extending the time to serve a proposed bill of exceptions until after the term at which judgment was rendered and then to refuse to sign it because the term had expired when it was offered for signature, cannot be made consistent.

The petitioner's attorneys were in no degree wanting in diligence. The policy and reason of the rule laid down in *Müller* v. *Ehlers* was not violated, any more than its letter. None of the mischiefs therein referred to have or could occur.

30

The rules of Court contemplate a settlement of bills of exceptions, as far as possible by the parties themselves, leaving to the Judge the settlement of disputed points only and such general revision of the proposed case as he may deem proper or advisible. Where one side proposes its case with due diligence and the other side has proposed its amendments, an error of a few days in the length of the notice of presenting the bill for final settlement is trivial and one easily waived.

31 To hold the contrary would practically deprive the defendants of their right to appeal and amount to a denial of justice. The right for the rendering effectual of which this Court was established, is a right of which the citizen is not to be lightly deprived.

It is respectfully submitted on the part of petitioner that the bill of exceptions was duly presented for settlement and signature within the time allowed for that purpose by the standing rules of the Court, as extended

by the special order of the learned Judge and the consent of the plaintiff's attorneys, and that it is a matter of right that said bill should be settled and signed. 32

This right having been denied them by the learned Judge, whose duty it was to settle and sign the bill of exceptions, the only appropriate remedy is a mandamus from this Court to compel the performance of that duty.

Ex parte Crane, 5 Peters, 190.
Ex parte Bradstreet, 6 Peters, 774. 33
Ex parte Bradstreet, 7 Peters, 634.
High on Extraordinary Legal Remedies, §§ 199, 200.

The motion for an order to show cause should therefore be granted.

EDMUND WETMORE,
Counsel for Petitioner.

MARTIN B. BROWN, Printer and Stationer, 49 and 51 Park Place, New York.

Supreme Court of the United States.

OCTOBER TERM, 1888.

Ex parte:

IN THE MATTER

of

The Petition of THE CHATEAUGAY ORE AND IRON COMPANY, praying for a writ of mandamus.

} Original, No. 3.

Additional Brief in Support of the Petition.

The petition herein is founded upon the claim that the bill of exceptions, which was submitted to Judge Shipman April 10, 1888, was prepared and submitted in proper time.

This brief is offered in further support of the petitioner's position.

For convenience of reference the steps taken to procure the bill of exceptions and the different dates are again stated, and are as follows:

1. January 25, 1888, and during the October, 1887, term. Verdict rendered against petitioner (Petition, fols. 8, 9).

2. Motions then made in open Court in presence of counsel for the adverse party;

(*a.*) To set aside the verdict as against the evidence.

(*b.*) For a new trial on the exceptions taken to the rulings of the Court.

(*c.*) For an extension of time within which to prepare and serve a bill of exceptions.

(*d.*) For a stay of proceedings.

Petition, fol. 12.

These motions were disposed of by the Court, as follows: The motion to set aside the verdict was denied; the motion for a new trial was entertained, but the argument of it postponed to a future day to be fixed when the bill of exceptions was settled; forty days' time was granted in which *to prepare and serve* a bill of exceptions; judgment was directed to be entered, but execution thereon was stayed until the decision of the motion for a new trial.

Petition, fol. 13.

3. January 27, 1888. The session of the Court presided over by Judge Shipman adjourned, and the said Judge then departed from the District and did not return into it until April 2, 1888.

Petition, fol. 24.

4. January 31, 1888. Judgment entered.

Petition, fol. 14

5. February 21, 1888. Expiration of October, 1887, term.

Petition, fol. 22.

6. March 3, 1888. Bill of Exceptions prepared by petitioner and served on the adverse party.

Petition, fol. 14.

7. March 5, 1888. Expiration of the forty days allowed within which *to prepare and serve* bill of exceptions.

8. March 13, 1888. Ten days further time within which to propose amendments to bill, asked for by adverse party and granted by petitioner.

Petition, fol. 15.

9. March 23, 1888. Amendments to bill served by adverse party on the petitioner.

Petition, fol. 16.

10. March 27, 1888. Notice served by petitioner on adverse party to appear before Judge Shipman on April 10, 1888, to settle the bill.

Petition, fol. 17.

11. April 2, 1888. Beginning of the April term of the Court and return of Judge Shipman into the District.

Petition, fol. 24.

12. April 10 and 11, 1888. Appearance of the parties before Judge Shipman to settle the bill, and his refusal to entertain it.

13. April 11, 1888. Stay of proceedings vacated.

14. April 17, 1888. Order vacating stay of proceedings resettled.

(The last two facts do not appear on the face of the petition, but the order itself as resettled, showing the date of its entry, has been returned by the Court below as a part of the proceedings in the cause, and the peti-

tioner begs leave to refer to the transcript now on file in this Court, and which has already been printed, for the purpose of establishing these facts. See pp. 27, 28).

15. April 27, 1888. Writ of error and citation sued out by petitioner and served on adverse party and *supersedeas* obtained.

Petition, fol. 39,

16. May 18, 1888. Motion for a reargument of petitioner's application to settle and sign bill of exceptions denied by Judge Shipman.

Petition, fol. 21.

It is a general rule of practice that a bill of exceptions taken on the trial must be reduced to form and signed by the Judge during the term at which judgment is rendered, but this limit of time may be extended by the general rules of practice of a particular Court, by a special order of Court in a particular case, or by consent of parties.

Müller *vs.* Ehlers, 91 U. S., 249.
Stanton *vs.* Embrey, 93 U. S., 548, 550.
Hunnicutt *vs.* Peyton, 102 U. S., 333.
Davis *vs.* Patrick, 122 U. S., 138, 140, 143.
U. S. *vs.* Breitling, 20 How., 252.

The main reason for this rule seems to be that with the expiration of the term the parties are presumed to be out of Court, and the Court cannot act upon their rights in their absence.

The case of *Müller* vs. *Ehlers*, in which this rule was enunciated, and upon which stress was laid by Judge Shipman in declining to consider the proposed bill, was widely different in its facts from the present case. In that case no notice was given of the intention of the excepting party to apply for a bill of exceptions, either during the term or after it. No application was made

for any extension of time. The bill of exceptions was wholly *ex parte*.

It was upon such state of facts that the act of the Judge in signing the bill of exceptions was declared *coram non judice*, but in giving this decision the Court states the general rule as follows:

"As early as *Walton* vs. *United States*, 9 Wheat., 651, " the power to reduce exceptions taken at the trial to " form, and to have them signed and filed, was, under " ordinary circumstances, confined to a time not later " than the term at which the judgment was rendered. " This, we think, is the true rule, and one to which " there should be no exceptions without an express " *order of the Court* during the term or *consent of the* " *parties*, save under very extraordinary circumstances. " Here we find *no* order of the Court, *no* consent of the " parties, and *no* such circumstances as will justify a " departure from the rule."

(Italics not in original.)

91 U. S. *ubi sup.*, 251.

In the present case the facts are precisely opposite. Here immediate notice was given, time was duly applied for and obtained at the trial term, notice of all subsequent proceedings was given the adverse party, and those proceedings actually participated in by him.

The rule, both in its letter and its spirit, we contend was complied with by the petitioner.

Both for reasons already stated in the first brief filed, and for others, the bill of exceptions was presented for settlement and signature in due time.

It was assumed, in the original brief, that the judgment was rendered at the October term at which the trial was had.

In strictness, as will be hereafter noted, the judgment was not rendered, *i. e.*, did not become final, until

the subsequent April term, during which the bill of exceptions was submitted, but whether rendered at the October or at the April term, the bill of exceptions was submitted in time, because,

First.

IF IT BE HELD THAT THE JUDGMENT WAS RENDERED AT THE OCTOBER TERM, THEN THE TIME FOR SIGNING AND SETTLING THE BILL OF EXCEPTIONS WAS DULY EXTENDED BEYOND SAID TERM.

1. *By the order of the Court made at the close of the trial allowing forty days for that purpose.*

The time so allowed expired March 5, 1888.

The October term could not have continued beyond Saturday, the 25th of February, 1888, because, on Monday the 27th of February, 1888, a new term of the Court began, in accordance with section 658 of the Revised Statutes.

The argument on this point is continued in the brief already filed at pp. 5 and 6.

2. *By the consent of counsel for the adverse party.*

It needs no argument to show that consent can be evidenced by acts as well as by words.

If, then, for any reason, the parties might have been deemed out of Court either when the October term ended and the February term began, or when the forty days allowed at the close of the trial expired on March 5, yet the adverse party to the proceedings to procure a bill of exceptions, did not avail himself of such dismission, but elected to remain in Court, delayed the proceedings by asking time to propose amendments, took part in the proceedings by preparing and serving

amendments, and recognized them as pending down to the very last moment by receiving and retaining the notice of settlement.

These acts amounted to a consent on the part of the adverse party, to enlarge the time within which the bill of exceptions might be allowed, assuming that such enlargement was necessary. They are equivalent to an unqualified general appearance in the proceedings instituted by the petitioner to obtain a bill of exceptions and a waiver of irregularity, if any existed, in the manner in which the adverse party was kept in Court.

Hart *vs.* Small, 4 Paige, 288.
Silliman *vs.* Clark, 2 How. Pr. (N. Y.), 160.
N. Y. Central Insurance Co. *vs.* Kelsey, 13 How. Pr. (N. Y.), 535.
Tidd's Practice, p. 513.

3. *The standing rules of the Court in which the trial was had, whether the State or the Federal rules of practice apply to proceedings therein to procure the signing and settlement of a bill of exceptions, extend the time for those proceedings, without regard to the fact that such extension may last beyond the end of the term at which the judgment was rendered.*

Rule 67 of the rules for said U. S. Circuit Court for the Southern District of New York, requires the bill of exceptions to be prepared and served on the adverse party before entry of judgment, unless the time shall be enlarged by the Judge, as confessedly was done in this case. That order allowed forty days in which *to prepare and serve* the bill, not forty days within which to prepare, serve and procure it to be settled and signed. The bill being prepared and served within the forty days, the rule then stepped in and granted, if the Circuit Court rule prevail, four days time, and if the State Court rules prevail, ten days time to the adverse

party to propose amendments. In the present case the counsel for the adverse party evidently assumed, as did counsel for the petitioner, that the proceedings were governed by the rules of State practice, for he kept silent until ten days after the service of the proposed bill (March 3 to March 13), when he came in and asked for time to propose amendments, which was given him, The amendments being served on March 23, the rules, whichever apply, again gave time, and here both rules agree. The party proposing the bill has four days time in which to consider the amendments and accept them, or else, if he reject them, to serve notice of settlement.

The latter course was adopted by petitioner in this case. Notice of settlement was given, the time being fourteen days, as allowed by the State rule, instead of four days as allowed by the Circuit Court rule. It was, however, in accordance with the preceding practice of the adverse party in allowing ten days to elapse after the bill was served, without either proposing amendments or obtaining time, a delay which, under the letter of the Circuit Court rule, forfeited his right to amend the bill at all, while under the State rules it was regular. In addition to this, the notice was received and retained. It gave the adverse party more instead of less time than he was entitled to under the rule of the Circuit Court. Strict practice would require in such a case that a party receiving an irregular notice should at once return it, or in some way notify the other party that the notice given is not acquiesced in. Had this been done the irregularity might have been corrected by procuring an enlargement by order of Court, because a notice of "not more than four days," as required by the Circuit Court rule, was not in this instance practicable for the reason that the Judge before whom it must be made returnable was not within the District when it was served on

March 27, and was not expected to return into the District, and in fact did not return until April 2, six days after the notice was given.

We submit, therefore, that under all the circumstances, the counsel who caused that notice to be served had a right to believe, and rely upon the belief, that it was acquiesced in by the other side. *Qui tacet consentire videtur.*

Second.

THE BILL OF EXCEPTIONS IN THE PRESENT CASE OUGHT TO BE CONSIDERED AS HAVING BEEN TENDERED TO THE COURT ON MARCH 3, 1888, AND WITHIN THE FORT DAYS ORIGINALLY ALLOWED FOR THAT PURPOSE.

The provisions of the rules of Court requiring the proposed bill to be served on the adverse party, requiring him to admit its correctness or else point out, by proposed amendments, wherein it is erroneous, and then requiring the party preparing the bill to admit such of the proposed amendments as he properly can, are all in the interest of the Judge and operate, and are intended to operate, to relieve the Judge of the burden of examining the whole of the bill proposed, so as to see that it states correctly the proceedings on the trial to which exceptions were taken.

When, therefore, a bill of exceptions is drawn up and served on the opposite party and thereby put in train for settlement, the only acts remaining to be done being those which must be done by the Judge, or by counsel for the purpose of lightening his labors; from that time, provided the matter be followed up with reasonable diligence, the bill ought to be deemed as in the hands of the Court.

Ah Lep *vs.* Gong Choy, 13 Oregon, 205.

In the case cited Thayer, *J.*, says (p. 211): "The bill "of exceptions should be tendered to the Judge imme- "diately after the trial unless a definite time is given "therefor. The nature of the affair requires this to be "done. But the settlement and allowance of the state- "ment of it may necessarily occupy a long time. In "my opinion that matter should be left largely to the "convenience of the trial Judge."

Especially ought this to be the rule where, as in this case, the party seeking to take advantage of the delay in settlement was himself responsible for a part of it (see *The People* vs. *Williams*, 91 Ill., 87, 90).

Third.

THE JUDGE HAVING BEEN ABSENT FROM THE DISTRICT, BOTH WHEN THE OCTOBER TERM EXPIRED AND ALSO WHEN THE FORTY DAYS ALLOWED BY THE ORDER MADE AT THE CLOSE OF THE TRIAL EXPIRED, THE BILL OF EXCEPTIONS WAS SEASONABLY TENDERED IF SUBMITTED TO THE JUDGE WITHIN A REASONABLE TIME AFTER HIS RETURN.

The petitioner, in any aspect of the case, had the whole of the forty days originally allowed in which to procure the allowance of its bill of exceptions. The time so allowed expired March 5, and during the most of it Judge Shipman was absent from the District and continued absent until the 2d day of April, when the April Term of Court began. His judicial duties required his presence in his own District. A term of the District Court for the District of Connecticut was appointed by statute for February (Sec. 572 of R. S.). The *signing* of a bill of exceptions is a mere ministerial act, which might, perhaps, be performed by the Judge anywhere, but the *settlement* of the bill is in its nature judicial (*Tweed* vs. *Davis*, 1 Hun, 252, 255). It can, therefore, be performed only within the territorial

limits of the Court in which the cause is pending. The Circuit Court of the United States in and for any given District is a court separate and distinct from all other courts, and its jurisdiction is limited by the confines of the District.

Revised Statutes, sec. 608.
Picquet *vs.* Swan, 5 Mason, 35, 40.

Judicial acts done by a Judge without the territorial limits of his Court are nullities.

Buchanan *vs.* Jones, 12 Georgia, 612.
Northrup *vs.* The People, 37 N. Y., 203.

It was, therefore, impossible for the petitioner to have proceeded with the settlement of the bill during the period when the Judge was absent from the District. Delay during that period cannot prejudice the petitioner for it was the act of the Court.

Broom's Legal Maxims,* 86.
People *vs.* Williams, 91 Ill., 87.
State *ex rel.* Johnson *vs.* Dyer, 99 Ind., 426.
Davis *vs.* Patrick, 122 U. S., 143.

In *People* vs. *Williams*, *supra*, it was said by the Supreme Court of Illinois:

"It would be an act of gross injustice for a Circuit "Judge to allow a party thirty or sixty days to file a "certificate of evidence in a case, then leave the State "on pleasure or business, remain out of the State un- "til the time expired and then hold that the party was "barred by lapse of time."

The petitioner proceeded with all reasonable diligence after the return of Judge Shipman into the District. Notice of settlement was served *before* his return, and although the day fixed was not the earliest possible, yet we submit that no rule of reasonable dili-

gence requires it to be the utmost possible. The bill was in fact submitted eight days after the return of the Judge.

In the case above cited of *Johnson* vs. *Dyer*, the Supreme Court of Indiana refused the mandamus sought for, because the excepting party did not proceed with reasonable dilligence after the return of the Judge into the State. He allowed fifty days to pass by in silence.

Fourth.

THE JUDGMENT, ALTHOUGH IN FORM, ENTERED ON JANUARY 31, 1888, AND DURING THE OCTOBER TERM DID NOT IN LAW BECOME A FINAL JUDGMENT UNTIL THE APRIL TERM, WHEN THE ORDER OF APRIL 17 WAS MADE VACATING THE STAY OF PROCEEDINGS, AND A BILL OF EXCEPTIONS TENDERED AT THE APRIL TERM WAS, THEREFORE, IN TIME.

The petition in this proceeding and the transcript of the record in the action of *Blake* vs. *The Chateaugay Ore and Iron Company*, now on file in this Court, which record has already been printed for the use of the Court on motion to dismiss, show clearly and distinctly that a motion for a new trial upon the exceptions taken was made by the petitioner in the Circuit Court at the close of the trial *and before judgment had been either entered or directed on the verdict.* (See fols. 61, 64, 67, 71, 74, 75 and 77 of printed record).

This motion was regularly and seasonably made.

Emma Silver Mining Company *vs.* Park,
14 Blatch., 411.

And in accordance with everyday practice in the New York Courts under the Code of that State, sections 998 and 999, which are as follows:

"Section 988. It is not necessary to make a case for

"the purpose of moving for a new trial upon the min-
"utes of the Judge who presided at a trial by a jury."
* * * *

"Section 999. The Judge presiding at a trial by a
"jury may in his discretion entertain a motion made
"upon his minutes at the same term, to set aside the
"verdict and grant a new trial upon exceptions; or be-
"cause the verdict is for excessive or insufficient dam-
"ages or otherwise contrary to the evidence or contrary
"to law." * * *

The motion was entertained by the Court and the judgment which the successful party was allowed to enter was superseded by stay of proceedings, not only during the forty days allowed for the preparation of the bill of exceptions upon which, as a matter of convenience and in accordance with the provisions of rule 71, of the Circuit Court, the motion was to be heard, but also until the decision of the motion.

The Judge, when the motion was made and in the presence of counsel for both parties, stated that he would fix a time for the hearing of it on the settlement of the bill of exceptions (Petition, p. 13). This was equivalent to a continuance of the motion until the bill should be settled. The motion, therefore, remained pending until the 11th of April, when the Judge refused to act on the bill of exceptions, or until April 17, when the order vacating the stay was finally entered.

The judgment, therefore, did not become a final judgment until after the April term had begun.

Brockett *vs.* Brockett, 2 How., 238.
Memphis *vs.* Brown, 94 U. S., 715.
Texas & Pacific R. R. Co *vs.* Murphy, 111 U. S., 488.
The People *vs.* Gary, 105 Ill., 264.
Greeley *vs.* Percival, 21 Florida, 421.
N. Y. C. & St. L. R. R. Co. *vs.* Doane Sup. Ct. of Indiana), 2 West. Rep. 733.

That the judgment now in question did not become a final judgment until April 17, has been expressly decided by the Court below. Immediately after the stay was vacated, execution was issued which the petitioner moved to set aside as irregular in that it was issued in violation of sec. 1007, R. S., which provides that in cases when a writ of error may be a *supersedeas* execution shall not issue until ten days after the rendition of the judgment. This motion was granted, the following memorandum being filed by Judge Lacombe:

"The execution issued prior to the entry of "the order of April 17, was premature and "must be vacated and set aside. The decision in "Whalen *vs.* Sheridan was *obiter* as to date of expira- "tion of term which was not in dispute but no ques- "tion as to such expiration arises now. The execu- "tion is vacated solely because, until the order of "April 17, the motion for a new trial was undisposed "of."

(This memorandum has been returned by the Clerk as a part of the proceedings below and will be found in the printed transcript at page 32).

The rule enunciated by this Court in *Müller* vs. *Ehlers* (91 U. S., 249) confining the time within which a bill of exceptions can be signed to "the term at which the judgment was rendered" is substantially the same as that of the common law courts in different States, and it has been held that, for the purpose of preparing a bill of exceptions, the trial of a cause is not completed, nor is the judgment deemed to be rendered so long as a motion for a new trial is pending.

The People *vs.* Gary, 105 Ill., 264, 270.
Greeley *vs.* Percival, 21 Fla., 421.

In the Florida case the rule of court required the bill of exceptions to be signed "at the term at which

"the verdict is rendered or the trial had," and yet a bill tendered at a subsequent term was held in time because, in law, the trial was not complete until the motion for a new trial was disposed of.

Fifth.

THE SETTLEMENT OF BILLS OF EXCEPTIONS IS A MATTER OF PRACTICE WHICH, UNDER SECTION 914 OF THE REVISED STATUTES, IS GOVERNED BY THE RULES OF THE STATE COURTS.

The steps taken by the petitioner to procure a bill of exceptions were strictly regular under the rules of State practice.

If, then, the settlement of a bill of exceptions is a matter of "practice" or a "mode of proceeding" within the meaning of section 914 of the Revised Statutes it seems clear that the bill ought to have been settled and signed.

The term "mode of proceedings" has been held to embrace the whole progress of the suit and every transaction in it. It includes proceedings after judgment as well as before, for the suit is not terminated until judgment is satisfied.

Wayman *vs.* Southard, 10 Wheat., 1.

This was held under the Practice Acts of 1789 and 1792, which were not nearly so sweeping in their terms as the Act of 1872, which now forms section 914 of the Revised Statutes. This latter act was manifestly intended as an advance upon the previous one in the direction of abolishing all the distinctions in remedial law (in common law causes), depending on the forum to which resort was had. The mischiefs which the Act of 1872 was designed to remedy are pointed out in Nudd *vs.* Burrows, 91 U. S., 426, Swayne, *J.* (p. 441).

"It had its origin in the Code enactments of many "of the States. While in the Federal tribunals the "common law pleadings, forms, and practice were "adhered to, in the State Courts of the "same district the simpler forms of the local "Code prevailed. This involved the necessity "on the part of the bar of studying two dis- "tinct systems of remedial law and of practicing ac- "cording to the wholly dissimilar requirements of "both. The inconvenience of such a state of things is "obvious. The evil was a serious one. It was the aim "of the provision in question to remove it. This was "done by bringing about the conformity in the Courts "of the United States which it prescribes. The "remedy was complete."

In *Lamaster* vs. *Keeler* (123 U. S. 376), Field, *J.*, says (p. 388), "The general language of the section in the "absence of qualifying provisions would comprehend all "proceedings in a cause from its commencement to its "conclusion, embracing the enforcement of the judgment "therein. * * * Any practice, pleading, form or "mode of proceeding which may be applicable in any "stage of a cause in a State court would, therefore, "under the section in question, in the absence of other "clauses be also applicable in a like stage of a similar "cause in a Federal court."

In the case last cited, the rule of State practice did not prevail because it related to the enforcement of a judgment, and by section 916 of the Revised Statutes, such provisions of State law must be adopted by the Federal court before they can be there enforced.

But section 914 contains the qualifying clause "as near as may be." The act of 1789, sec. 34, in making the laws of the several States, rules of decisions in the Federal Courts, excepted cases in which the laws of the United States provided otherwise. This seems to

suggest what, we submit, is the true construction of the qualification found in section 914, and that the only subject upon which the mode of proceeding in a Federal Court can differ from the mode of proceeding in the State Court are those concerning which Congress has established a rule. This construction is in harmony with the decision in *ex parte Fisk*, 113 U. S., 713. Inasmuch, therefore, as Congress has not legislated in respect to the course of proceeding upon bills of exceptions, it follows that their preparation is a proceeding the mode of which is governed by the State practice, and that so much of the rules of the Federal Court as are inconsistent with the rules of State practice were repealed. The words of section 914 are, "any rule of Court to the contrary, notwithstanding."

Bills of exception are expressly provided for by the Code of Civil Procedure of New York, although those words are not used. Section 997 of that Code is as follows:

"When a party intends to appeal from a judgment,
"rendered after the trial of an issue of fact, or to
"move for a new trial of such an issue, he must,
"except as otherwise prescribed by law, make a case
"and procure the same to be settled and signed by the
"judge or the referee by or before whom the action
"was tried, as prescribed in the general rules of
"practice; or in case of the death or disability of the
"judge or referee, in such manner as the Court directs.
"The case must contain so much of the evidence, and
"other proceedings upon the trial, as is material to
"the questions to be raised thereby, and also the
"exceptions taken by the party making the case. If
"it afterwards become necessary to separate the
"exceptions, the separation may be made, and the
"exceptions may be stated with so much of the
"evidence and other proceedings as is material to the
"questions raised by them in a case proposed and

" settled as directed in the general rules of practice, " or in the absence of directions therein by the Court " upon motion."

Under this section of the Code, rules of practice have been adopted, providing in express terms for the preparation and settlement of bills of exception (Rules 32 and 34, set out in full in petition).

We submit that these rules must prevail.

Sixth.

THE WRIT OF MANDAMUS IS THE APPROPRIATE REMEDY FOR AN ERRONEOUS REFUSAL BY A JUDGE TO SETTLE AND SIGN A BILL OF EXCEPTIONS.

It is a well recognized office of the writ of mandamus to compel the Judge of an inferior court to sign a bill of exceptions.

Ex parte Crane, 5 Peters, 190.
People *vs.* Williams, 91 Ill., 87.
People *vs.* Gary, 105 Ill., 264.
Benedict *vs.* Howell, 39 N. J., (Law) 221.
Page *vs.* Clopton, 30 Grattan, 415.
State *vs.* Hawes, 43 Ohio St., 16.
People *vs.* Van Buren, 41 Mich., 725.
Siebright *vs.* The State, 2 W. Va., 592.

And the writ lies not only to compel the signature of the bill, but also the settlement of it.

Page *vs.* Clopton, *supra.*
Benedict *vs.* Howell, *supra.*

It is unnecessary for the proposed bill of exceptions in this case to be attached to the petition. The relief sought by the petition is not to compel the Judge to sign the bill of exceptions in any particular form, but

to return a record of the proceedings before him at the trial, sufficiently full to show the exceptions taken and enable this Court to determine their propriety, and this only requires that the bill of exceptions should be settled in such form as the truth of the matter shall require. The Judge is not bound by the one proposed by the parties, and the contents of the one proposed by the parties is not material to the issues raised by this petition.

Seventh.

It is respectfully submitted that the prayer of the petition should be granted.

FRANK E. SMITH,
Counsel for Petitioner.

EDMUND WETMORE,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

In the Matter

of

The Petition of the CHATEAUGAY ORE AND IRON COMPANY for a Writ of Mandamus.

Brief of Theodore A. Blake, respondent, in opposition to motion for Writ of Mandamus.

Facts.

The negligence of the petitioner is admitted. It asks that this Court by writ of mandamus direct the Court below to *reverse its decision* made after argument and consideration, to relieve the petitioner from the legal consequences of its own neglect, and to allow and sign exceptions to which under the construction given by the Court to its own rules it is not entitled.

The claims on which the judgment below was founded were not contested. The respondent had built and been paid for one crushing mill of smaller capacity, and the

petitioner had used the mill and machinery in question, from September 1886, to the trial or about sixteen months. Its contention was that this mill had not the warranted daily capacity of six hundred tons of ore of which about 125,000 tons had been crushed at the time of the trial.

The trial presented a simple issue of fact. The length of the trial was due to the examination by the petitioner of all its employees in the operations of the mill.

The charge is given upon the material issue, which was fairly submitted to the jury. A verdict for the plaintiff was promptly returned, and judgment upon the verdict was ordered for the respondent, on January 25th, 1888.

There were eighteen written requests by the petitioner to the Judge to charge the jury.

The respondent then became a judgment creditor, entitled to collect his judgment, unless collection was postponed in conformity with the rules and practice of the Court.

January 25th, on the rendition of the verdict, a motion to set it aside as against evidence was overruled.

An oral motion for a new trial upon the exceptions was then made. There were at that time no exceptions. Memoranda for exceptions existed in the record and it was the petitioner's duty to put them in form and present them to the Court for allowance.

The statute, Sec 987, gives the Court in such a case, power "at the discretion of the Court" * * to stay execution forty-two days, "to give time to file in the clerk's office a petition for a new trial." Forty-two days is the limit of the power.

The Court gave the petitioner forty days, within which it was the petitioner's duty to perfect his exceptions and put the record in a condition to have his motion heard. The forty days expired on March 5th.

On March 5th, no proposed exception having been presented to the Court, and no extension of the forty days having been applied for, the petitioner's *right* to exceptions was terminated. He could only have his exceptions considered by an appeal to the discretion of the Court, founded upon facts which warranted the exercise of that discretion.

April 10th, more than a month after the 40 days under the order, and the 42 days under the statute had expired, the petitioner, for the first time, presented to the Court its proposed thirty bills of exceptions. The October term had ended and a new term had commenced.

No excuse for petitioner's negligence was made or attempted. There was a simple motion that the exceptions be then signed and allowed.

This motion the Court heard and denied.

A copy of the proposed exceptions was served on respondent's counsel two days before the 40 days expired. After the 40 days expired the respondent procured petitioner's consent to ten days' time for proposing amendments.

The reason for this was, that the term not having expired, the allowance of the exceptions was still within the judicial discretion. If it was exercised the amendments became a necessity.

The petitioner's action could not have been influenced by this extension. There was still abundant time to make the application before the expiration of the October Term (March 31). The petitioner did not make the application.

Subsequently the petitioner ascertained that one of the judges had suggested a query whether the term did not expire in February. On this added fact an application was made for a rehearing, which was also denied.

The petitioner then took out a writ of error April 27th, 1888, and, filing a bond, caused it to operate as a super-

sedeas. He then caused the record to be made up, and filed it in this Court on the 8th of October.

The respondent, Blake, has opposed all the motions of the petitioner under the belief that their object was delay upon grounds that had no substantial foundation. In that belief, on the twelfth of October he served petitioner with notice of a motion to dismiss the writ of error, with which he united a motion to affirm the judgment because the record presented no question.

Under the pressure of that motion and the impending danger that the writ of error would fail of its intended delay, this petition was filed. It proposes no amendment of the record, no certiorari, nothing but a mandamus to the justice to allow and sign exceptions, which are to remain in the Court below.

The decisions of Justice Shipman denying the petitioner's motion, were made after full argument, an examination of all the facts, and the decisions of this Court pertinent to the subject in the exercise of his judicial function. The petition alleges that the Court "decided that your petitioner's application for the settlement and signing of said bill of exceptions *must be denied.*" Pet., fol. 21

POINTS.

First.—Three preliminary objections are made to the present petition:

(*a.*) The writ of mandamus is not the proper remedy to restore to a party what he has lost by his own negligence. Such a party is not supposed to be entitled to its benefits.

(*b.*) The rule to show cause was not entered until after the time to file the record in this Court expired. The time to file the record expired on the 13th day of October, 1888, and the rule was not made until the 15th day of October, 1888.

By filing the record the plaintiff in error admits its completeness. It never has and does not now make any motion to correct the record. The granting of the writ would not affect the record on which the case must be decided.

(*c.*) It is decided by this Court to be among its *elementary rules* that the writ of mandamus cannot be used "to control the discretion of an inferior tribunal while acting or to reverse its decisions when made."

Matter of Burtis, 13 Otto, 103 U. S., 238.

In Railroad Co. *ex parte*, 11 Otto, 101 U. S. R., 711, which was an application by mandamus to require the Circuit Court after its refusal, to put petitioner into possession of a railroad decreed to it here, this Court said, "it is not consistent with the principles and usages of law, that we should in this summary mode revise the action of inferior courts, as to any matters about which they must or may exercise judicial discretion. * * The writ has never been extended so far, nor ever used to control the discretion and judgment of an inferior Court of record acting within the scope of its judicial authority" (citing numerous authorities).

In *exparte Flippin*, 4 Otto, 94 U. S., 348, where it was claimed that the Court below denied a motion to quash an execution claimed to be improperly issued, and the mandamus was to require the justice to quash the writ, this Court said:

"But if the Court has jurisdiction to issue process,

it has necessarily jurisdiction to decide as to its appropriate form. Here the process has been issued, and the Court upon motion, has decided that it was good in form and ought not to be quashed. Of this decision the petitioners complain and seek to have it reversed. This we cannot do by mandamus. Under that form of proceeding we may compel an inferior Court to decide upon a matter within its jurisdiction and pending before it for judicial determination, *but we cannot control its decision.* Neither can we in that way compel the inferior Court to reverse a decision which it has made in the exercise of its legitimate jurisdiction."

"If there is anything to the contrary of this in the case of *McCargo* vs. *Chapman*, 20 How, 555, *it is disapproved.*"

In the United States *agt.* the Secretary of the Interior, 116 U. S., 423, Mr. Justice Field for this Court, determines the principle of the writ of mandamus in the case of an executive officer, as applicable "only to ministerial acts, in the performance of which no exercise of judgment or discretion is required." The rule is the same in regard to inferior courts, unless it is apparent that the discretion has been abused. In the case at bar no such abuse can be suggested.

In Perry *ex parte*, 102 U. S. (12 Otto), 183, an application to set aside a stay of execution, which stay it was alleged was unauthorized by law, this Court said, "the object of this proceeding is to obtain from us an order requiring that Court to reverse its former decision and grant the relief it has once refused. That is the office of a writ of error or an appeal, and not of a writ of mandamus."

See also,

Schwab *ex parte*, 98 U. S., 240.
Loring *ex parte*, 94 U. S., 419.
Whitney *ex parte*, 13 Pet., 404.

It is admitted by the petition that the Court below acted upon the petitioner's motion. The petitioner was heard, and his motion that the bills of exception be signed was *denied*. This fact is fatal to the petition.

Morgan *ex parte*, 114 U. S., 174.
Hughes *ex parte*, 114 U. S., 147.
Brown *ex parte*, 116 U. S., 401.

Second.—The Court below must be regarded as the judge of its own rules and sessions.

Life Ins. Co., *vs.* Francisco, 17 Wal., 672.
U. S. *vs.* Breitling, 20 How., U. S., 252.

In the case last cited, *Chief Justice Taney* said, in a case which presented this point, in regard to an exception: "The time within which it may be drawn out and presented to the Court must depend on its rules and practice, and on its own judicial discretion." This is to be understood, of course, as to exceptions presented before the end of the Term.

In the case at bar, the October Term at which the judgment was rendered had passed, and a new Term had commenced. The power of the Court to allow exceptions had terminated. But if it had not, in the absence of any extension of the time, the petitioner could assert no lawful right to exceptions.

Finally.

The decision of the Circuit Court was right. It followed the reported decisions of this Court, and, had it decided

otherwise, this Court would have disregarded the exceptions.

Muller *vs.* Ehlers, 1 Otto, 249.
Walton *vs.* U. S., 9 Wheat., 651.
Jones *vs.* Grover & B. Sewing Machine Co., 24 L. Ed., 925.
Hunnicutt *vs.* Peyton, 12 Otto, 333.
Bronson *vs.* Schulten, 104 U. S., 410.
Phillips *vs.* Negley, 117 U. S., 665.
Brooks *vs.* Burlington & S. Ry. Co., 102 U. S., 107.

The application for a writ of mandamus should be denied.

L. E. CHITTENDEN,
Of Counsel for Respondent.